

THE ASSOCIATED SHIP AND SOUTH AFRICAN  
ADMIRALTY JURISDICTION

by

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As the candidate's Supervisor I agree to the submission of this thesis.

H STANILAND

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Lastly the writing of a thesis inevitably involves a considerable investment of time and thought that would otherwise be devoted to different purposes. During most of the time when I was writing it I was in busy practice as a senior member of the Bar and I have put the finishing touches to it during my first year as a judge. My family have missed my company when I have been absorbed in writing and have been philosophical about my obsession with associated ships. Throughout they have encouraged me in the endeavour. Above all my wife Janet has borne with fortitude the time spent in my study and the library and the long periods of introspection and engagement with my laptop. I dedicate it to her with love and gratitude.



## **ABSTRACT**

The associated ship and the jurisdiction to arrest such a ship created in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 is a unique legal institution in the world of maritime law and jurisdiction. The sister ship arrest envisaged by the Arrest Convention, 1952 is encompassed by the associated ship but the concept of an associated ship goes considerably further than the sister ship in going behind the separate corporate personality of ship-owning companies to their controlling interests and, on the basis of common control, providing that ships are associated. This status subjects them to arrest both in order to obtain security for court proceedings or arbitration, usually elsewhere than in South Africa, and arrest in actions *in rem* against the associated ship. This is in respect of claims arising in respect of other vessels in separate ownership. Although tentative consideration was given to a similar innovation when the Australian Law Commission undertook a review of admiralty law in Australia their legislation is confined to a surrogate ship arrest substantially along the lines of the sister ship arrest of the Arrest Convention. A proposal to introduce a similar institution by way of the revision of the Arrest Convention has not yet resulted in anything similar being introduced elsewhere.

In South African maritime practice the associated ship jurisdiction has proved to be an important innovation, especially in conjunction with the power to arrest a ship for the purpose of obtaining security for proceedings in a foreign court or arbitration tribunal, and a substantial amount of maritime work involves associated ships. As an institution it has not hitherto been subjected to close scrutiny and the overall purpose of this work is to do that. It takes as a starting point the revision of South African admiralty procedure and jurisdiction leading to the enactment of the Admiralty Jurisdiction Regulation Act and the introduction of the associated ship. This task has been undertaken against the background of the general development of maritime law, the attachment *ad fundandam et confirmandam jurisdictionem* under the Roman Dutch common law of South Africa and the action *in rem* available in South Africa under the Colonial Courts of Admiralty Act 1890. The study reveals the common roots of these institutions in the Roman Law and the practice in maritime courts around Europe from the Middle Ages onwards and forms a

part of the foundation for the proposition in the final analysis that South Africa has created an institution that is distinct from the English action *in rem* and having its own particular features derived from both its English and Roman Dutch forebears.

The central analysis explores from a critical standpoint the justifications advanced at the time for the introduction of the associated ship jurisdiction and finds these wanting notwithstanding that they have tended to linger in statements in the judgments of the courts. Instead a policy-based justification is advanced that it is submitted provides a proper justification for the associated ship jurisdiction in the South African context. Being based upon policy considerations it is not suggested that this justification is universally applicable or demands the same response from all nations, as each will be influenced by different factors depending on the nature of the maritime interests of the country considering such an institution. This is likely to hamper attempts to obtain international agreement on a similar jurisdiction to arrest vessels going beyond the provisions of the Arrest Convention.

In the light of the suggested justification of the associated ship jurisdiction the Act itself is analysed and various difficulties of interpretation are addressed. These include a critical analysis of certain controversial decisions and a consideration of the constitutional implications of the associated ship. Finally the different threads are brought together in an analysis of the nature and consequences of the arrest of an associated ship and the action *in rem* against the associated ship. The fact that the jurisdiction has been harnessed to two distinct purposes having entirely different features is highlighted.

Although maritime law always has a significant international dimension the fact that the associated ship is a uniquely South African institution means that the analysis is largely driven by the underlying principles of South African law and principles. The view is taken that the statute is a South African statute governing matters of the jurisdiction of South African courts and as such falls to be construed in the light of South African legal principles. The too ready resort on questions of interpretation (as opposed to substantive law where it is mandated as being the

applicable law in certain cases) to English precedents is deprecated although recognition is given to the influence that English admiralty law has played in the development of South African law in this field. Overall the conclusion is that the associated ship has proved to be a useful innovation particularly to claimants in the maritime field and will continue to make South Africa a favoured destination for maritime litigation.





## **DECLARATION**

I, Malcolm John David Wallis declare that

- (i) The research reported in this thesis, except where otherwise indicated, is my original work.
- (ii) This thesis has not been submitted for any degree or examination at any other university.
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M J D WALLIS



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## CHAPTER 1

### THE INTRODUCTION OF THE ASSOCIATED SHIP JURISDICTION

Surprisingly for a country with a lengthy coastline, a number of ports and a substantial trade by water, South African maritime jurisprudence was largely quiescent until the latter part of the 1960's with only a trickle of cases, principally cargo disputes and collisions. There were two jurisdictional regimes operating in parallel and applying two different systems of law in maritime cases. No attempt had been made to keep abreast of international maritime developments and in particular to apply international maritime conventions in South Africa<sup>1</sup>. Expansion of international trade and particularly the closure of the Suez Canal in 1967 saw an increase in maritime traffic around the southern tip of Africa bringing with it an upsurge in potential maritime litigation. The need for reform rapidly emerged and after one abortive attempt<sup>2</sup> the considered result of a process of review by the South African Law Commission<sup>3</sup> was the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983.<sup>4</sup>

When the Act came into operation on the 1<sup>st</sup> November 1983 it was generally well received by academic commentators.<sup>5</sup> Unusually for a statute it received express and fulsome judicial approval, with Milne JP describing it as:

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<sup>1</sup> The exception was the Hague Rules (the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on the 25<sup>th</sup> August 1924) that were largely incorporated into South African domestic law in terms of sections 306 to 310 of the Merchant Shipping Act, 57 of 1951.

<sup>2</sup> The Admiralty Jurisdiction Regulation Act 5 of 1972, which was never put into operation. C Dillon and JP van Niekerk, *South African Maritime Law and Marine Insurance: Selected Topics* 28; H Booysen, *Admiraliteitshowe in die Suid-Afrikaanse Reg* 1973 THRHR 241, 256-9.

<sup>3</sup> South African Law Commission, Report on the Review of the Law of Admiralty, Project 32 (1982).

<sup>4</sup> Referred to hereafter as 'the Act'.

<sup>5</sup> C Dillon and J P Van Niekerk, *South African Maritime Law and Marine Insurance : Selected Topics* (1983) 34; A Rycroft 'Changes in South African Admiralty Jurisdiction' [1984] 3 LMCLQ 417; H Staniland 'Developments in South African Jurisdiction in Maritime Law' 1984 Acta Juridica 271; H Staniland 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa' [1985] 3 LMCLQ 462. A lone voice of academic dissent was

‘... a model piece of legislation which would in many respects be an improvement on the admiralty legislation of other Western seafaring nations’.<sup>6</sup>

and Friedman J, speaking extra-curially<sup>7</sup>, expressed the view that it is ‘an outstanding piece of legislation’. There can be little doubt that legal practitioners active in maritime work welcomed it as a long-overdue modernisation of the law that put an end to the unhappy dichotomy then existing of two separate courts (albeit consisting of the same judges) in maritime matters, commonly referred to as admiralty and parochial courts. The former of these exercised the jurisdiction of a Colonial Court of Admiralty<sup>8</sup> and applied English admiralty law as at 1890<sup>9</sup> and the latter the jurisdiction of the Supreme Court of South Africa<sup>10</sup> and applied Roman-Dutch law.<sup>11</sup> With masterly understatement Innes CJ described as ‘not a satisfactory state of things’ a situation that had the result:

‘... that in South Africa and wherever the common law differed from English maritime law, the issue of a dispute might sometimes depend upon whether it was brought before one tribunal or the other.’<sup>12</sup>

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that of H Booysen ‘*South Africa’s New Admiralty Act: A Maritime Disaster?*’ (1984) 6 Modern Business Law 75 83. However his complaint appears to have been limited to the continued application of English law to many claims as he preferred the purist approach of applying Roman Dutch law to all claims. In taking this stance he failed to indicate the sources from which the Roman Dutch law was to be derived.

<sup>6</sup> *Euromarine International of Mauren v The Ship ‘Berg’* 1984 (4) SA 647 (N) 663C.

<sup>7</sup> In an address delivered at a seminar on maritime law and practice held in Johannesburg on the 4<sup>th</sup> October 1984 under the auspices of the School of Law in association with the Centre for Continuing Education of the University of the Witwatersrand and published under the heading ‘*Maritime Law in Practice and in the Courts*’ in 1985 SALJ 45 54.

<sup>8</sup> Under the Colonial Courts of Admiralty Act 1890 (53 and 54 Vict. C. 27).

<sup>9</sup> The crucial date was the 25<sup>th</sup> July 1890. *Shipping Corporation of India Ltd v Evdomon Corporation Ltd* 1994 (1) SA 550 (A) 560A-C. Statutory amendments after that date were not part of the law administered by the court sitting as a Colonial Court of Admiralty. *The Yuri Maru, The Woron* [1927] AC 906 (PC); *Tharros Shipping Corporation SA v Owner of the Ship ‘Golden Ocean’* 1972 (4) SA 316 (N) 321-2; *Beaver Marine (Pty) Ltd v Wuest* 1978 (4) SA 263 (A).

<sup>10</sup> Established under section 95 of the Union of South Africa Act 9 Edw. VIII Ch 9.

<sup>11</sup> *Crooks & Co v Agricultural Co-operative Union Limited* 1922 AD 423.

<sup>12</sup> *Crooks & Co v Agricultural Co-Operative Union Limited, supra*. Curiously H Booysen ‘*Admiralty Jurisdiction*’ 1975 THRHR 387 394 seems to have viewed the overlapping jurisdictions with equanimity subject to the admiralty



This overlap frequently turned maritime litigation into a contest closely resembling a particularly intricate and subtle game of chess, where different parties selected their court and system of law in order to procure the perceived advantages of one system over the other<sup>13</sup>. The position was described thus by Friedman J:

‘First, there was now something of an overlap in the jurisdiction of a division of the Supreme Court of South Africa, sitting, on the one hand, as a court of admiralty, and, on the other hand, exercising its common law jurisdiction. The law to be applied by the court would depend on which jurisdiction it exercised and so, too, would the result. Perhaps the most significant effect of this anomaly was in the ranking of claims, since the admiralty law of England was not, in all respects, the same as the common law of South Africa in this regard. Consequently the ranking of claims against the proceeds of a sale of a ship might depend upon the ‘accident’ of whether its eventual sale was effected pursuant to an order in admiralty or to a common-law sale in execution.’<sup>14</sup>

In the interests of their clients practitioners often wished to invoke the admiralty jurisdiction, which was wider than that of the parochial courts, because it was not restricted by whether the claimant was a *peregrinus* of South Africa nor, in general, by the fact that the claim had not arisen in a South African jurisdiction. However this desire was hampered by the fact that the law and jurisdiction was ossified as at 1890 and relevant legal materials were not readily accessible<sup>15</sup>. In addition from the perspective of foreign litigants the existence of potentially

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jurisdiction being updated from 1890. In an earlier era when overlapping was identified in the Cape Colony by the decision in *Smith v Davis* (1878) 8 Buch 66 it led to the passage of Law 8 of 1879 (Cape) which replaced Roman Dutch law with English law in maritime and shipping matters where the Vice-Admiralty Court and the Supreme Court had concurrent jurisdiction. That Act was in turn repealed by Act 3 of 1977.

<sup>13</sup> In the busiest maritime jurisdiction of Natal (as the province of KwaZulu-Natal was then known) where this legal manoeuvring could take place it was usually motivated by a desire to invoke or avoid the decision of the Full Court of the Natal Provincial Division in the case of *The SS ‘Mangoro’* (1913) 34 NLR 67. CF Forsyth ‘*The Conflict between Modern Roman Dutch Law and the law of Admiralty as administered by South African Courts*’ 1982 SALJ 255.

<sup>14</sup> 1985 SALJ 45 at 53. *Peca Enterprises (Pty) Ltd and another v Registrar of Supreme Court, Natal N.O. and others* 1977 (1) SA 76 (N) provides an illustration of the unsatisfactory position that existed.

<sup>15</sup> In his speech in the Second Reading Debate on the Bill that became the Admiralty Jurisdiction Regulation Act 5 of 1972 the Minister of Justice claimed that no court in South Africa had a complete set of the Admiralty Rules and that a copy had only recently become available from the private documents of Harcourt J. Hansard, Vol 37, column 453. The writer doubts whether this was correct as his own copy of the Admiralty Rules was given to him in 1977 by a senior member of the Bar who had practical experience in admiralty matters and a number of advocates were certainly in possession of copies. It would be surprising to discover that the court libraries in maritime jurisdictions lacked copies of the Rules.

conflicting legal systems was not conducive to making South Africa an attractive jurisdiction and made litigation in this country a hazardous venture. Practitioners are generally concerned to have clarity regarding the content of the law, and wanted to be able to give advice expeditiously and desired (a sentiment not unmixed by the prospect of personal advantage in the form of increased quantities of work) to promote South Africa as a desirable admiralty jurisdiction. They were undoubtedly happy to shake off the ‘Victorian cobwebs’<sup>16</sup> of the existing system.

The Act was, however, more than simply an updating of the law and an ironing-out of jurisdictional oddities. The modernisation undertaken in the Act was ‘radical’ in conception and scope and was aimed at many aspects of admiralty law and practice.<sup>17</sup> Friedman J went on to describe it as ‘bold, innovative and comprehensive’<sup>18</sup> containing provisions that are ‘novel, unusual and at times far-reaching.’<sup>19</sup> Amongst these provisions, and indeed as subsequent events

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<sup>16</sup> Advocate ‘Farewell Victoria Admiralty Law’ (1983) 13 BML 84. A Waring *Charterparties, a comparative study of South African English and American law* (1983) 4 expressed the hope that ‘... this neglected and unsatisfactory area of the law will be rectified shortly by a long-overdue, legislative overhaul of Admiralty law.’ In the first report by the President of the Maritime Law Association delivered on the 15th April 1977 he said: ‘This Association was born out of, on the one hand a sense of frustration on the part of practitioners in having to comply with antiquated provisions of Admiralty Practice and the consequent confusion arising from the conflict between such practice and our common law, and on the other hand the realisation that our domestic maritime legislation was not keeping pace with developments in the rest of the world.’ Later in the same report he added: ‘This area of the law has bedevilled the work of attorneys for many many years quite apart from leading to inequities in the judgments of the courts and making us seem naïve if not incompetent in the eyes of our clients and associates overseas. I think you will agree that we shall all be greatly relieved once the appropriate amendments to this outdated legislation become effective.’ See in general on the need for reform G Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* (2006), 11-12.

<sup>17</sup> The description is that of Friedman J in an address delivered to the Maritime Law Association at Cape Town on the 18<sup>th</sup> July 1986 published under the title ‘*Maritime Law in the Courts after 1 November 1983*’ in 1986 SALJ 678.

<sup>18</sup> In the address referred to in footnote 7 above, 54.

<sup>19</sup> *Katagum Wholesale Commodities Company Limited v The m.v. ‘Paz’* 1984 (3) SA 261 (N) 263A. Friedman J’s enthusiasm for the legislation was not necessarily shared by all his colleagues. In his separate judgment in the same case Didcott J adverted to the Act’s potential to allow South African courts to be ‘transformed into some sort of judicial Liberia or Panama’ and to be ‘turned into a court of convenience for the wandering litigants of the world’ (at 263H). The metaphor, was couched in the striking language that so often characterised Didcott J’s judgments, but it hardly survives scrutiny, perhaps due to the fact, as he confessed, that he was ‘insufficiently steeped in shipping matters’. The analogy between the use of flags of convenience that conceal the identity of those operating ships and enable the beneficial owners of vessels to avoid the payment of legitimate debts, and jurisdictional provisions which enable a court to deal with that very situation at the instance of open and legitimate creditors, breaks down at every

have shown pre-eminent amongst them, were the provisions enabling an action *in rem* to be pursued by way of the arrest of an associated ship<sup>20</sup> rather than the ship in respect of which the claim lay<sup>21</sup>. These were described as ‘novel and far-reaching’<sup>22</sup> involving an ‘unprecedented extension’ of any jurisdiction existing elsewhere in the world under ‘sister ship’ provisions embodied in the law of those countries that had adhered to the 1952 Arrest Convention.<sup>23</sup> Friedman J, who was undoubtedly the Act’s most enthusiastic protagonist in print and the judge who at the time had the most extensive knowledge and practical experience in maritime matters, described these provisions as ‘a most progressive innovation in relation to actions *in rem*’.<sup>24</sup>

So much for the views of the associated ship jurisdiction at its inception. It spawned, as had been anticipated, a considerable amount of litigation some of which rapidly exposed difficulties with the language of the relevant sections. These and other teething problems with the Act (particularly with the provisions concerning the ranking of claims in section 11 thereof) led to a protracted debate within the ranks of the membership of the Maritime Law Association and

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point, particularly when viewed in the light of the fact that since 1893 the South African courts, sitting as Colonial Courts of Admiralty, had always been entitled to entertain suits between *peregrini*.

<sup>20</sup> This is the general way of referring to any ship described in section 3(7) of the Act. However that section includes ships in common ownership or sister ships in terms of the Arrest Convention (footnote 28, *infra*). The true innovation of the Act lay in the power to arrest a ship other than the ship in respect of which the maritime claim had arisen and owned by a different juristic person. Such a vessel is hereafter referred to as a ‘true associated ship’.

<sup>21</sup> Contrary to the clear requirement of the English *in rem* jurisdiction as previously applied by the court sitting as a Colonial Court of Admiralty at least since the decision in *The Beldis* 1936 P 1; 18 Asp MLC 598 (CA). D J Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987) 27.

<sup>22</sup> By H Staniland, ‘*The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa*’ [1985] LMCLQ 462, 467

<sup>23</sup> The International Convention relating to the Arrest of Sea-going Ships concluded in Brussels on 10 May 1952. This will be referred to as the Arrest Convention. The accuracy of this statement will be examined later.

<sup>24</sup> 1985 SALJ 45 at 55. In the address published in 1986 SALJ 678 at 679 he said: ‘The fact, therefore, that the Act provides far-reaching and even revolutionary methods to prevent recalcitrant debtors from evading their legal debts, for example, by the simple ruse of creating ‘single-ship’ companies, is, in my view, something to be welcomed, not deprecated.’ That attitude clearly reflected the view at the time that there is something deceitful in a shipowner so arranging its affairs.

eventually to substantial amendments in 1992<sup>25</sup> that not only clarified certain issues but extended the scope of the associated ship jurisdiction<sup>26</sup> and in some ways altered its thrust. Subsequent academic comment and critique has been muted.<sup>27</sup> The high hopes expressed in the early years that other countries might follow the lead set by South Africa<sup>28</sup> have not yet been realised.<sup>29</sup> In

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<sup>25</sup> Admiralty Jurisdiction Regulation Amendment Act 87 of 1992.

<sup>26</sup> Particularly by way of the presumption that charterers are the owners of a chartered ship. s3(7)(c).

<sup>27</sup> Professor Staniland reviewed the amendments in an article '*Ex Africa semper aliquid novi : Associated ship arrest in South Africa*' [1995] LMCLQ 561. The provisions are dealt with generally in their original form in D J Shaw, *Admiralty Jurisdiction and Practice in South Africa*, pp 35-42; and as amended in J Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) pp 103-114 and G Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* pp 66-76. Elements of the jurisdiction are touched upon in M J D Wallis '*The associated ship jurisdiction in South Africa: Choice assorted or one bite at the cherry?*' [2000] LMCLQ 132 and more recently in an article by Graham Bradfield, '*Guilt by association in South African admiralty law*' [2005] 2 LCMLQ 234. The only other academic writing of which I am aware are two un-published minor dissertations in the Faculty of Law, University of Cape Town presented in partial fulfilment of the requirements for an LLM. The one is by Michael Soltynski entitled '*The South African associated ship provisions*' and the other by Craig Cunningham entitled '*The Arrest of an Associated Ship in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act No 105 of 1983 (as amended): The Burden of Proof*'. The similarly unpublished LLM dissertation in the Faculty of Law, University of Natal, 1986, by A G Jeffery entitled '*The Nature of the Action in rem*' expressly states that a detailed consideration of the associated ship provisions of the Act is beyond the scope of the dissertation. As will be apparent from the discussion later in this work I do not share the central thesis of Jeffery's work that the English judges (particularly Lord Stowell and Dr Lushington), their Registrars and the practitioners from Doctors' Commons who appeared in the Admiralty Court, erroneously confused the action *in rem* with an earlier procedure in which action was commenced by the arrest of any property of the debtor. I take the view that the original scope of the general form of action in Admiralty was cut down in consequence of the attacks of the common law courts on admiralty and this led to the evolution of what is now known as the action *in rem*.

<sup>28</sup> Australia, which like South Africa had an admiralty jurisdiction founded in the Colonial Courts of Admiralty Act 1890, reviewed its law in 1985 and considered whether to follow the example of South Africa. H Staniland '*Developments in South African Jurisdiction and Maritime Law*' 1984 *Acta Juridica* 271 276; H Staniland and J S McLennan '*The Arrest of an Associated Ship*' 1985 SALJ 148 152. However, at the end of the day Australia contented itself with a 'surrogate ship' arrest on a similar basis to the 'sister ship' provisions of the 1952 Arrest Convention. Australian Law Commission 33 '*Civil Admiralty Jurisdiction*' (1986), paras 138-141. See s 19 of the Admiralty Act 34 of 1988 (Australia). There is some recent academic writing suggesting that this should be reviewed. S. Derrington '*Ship Arrest and the Admiralty Jurisdiction of Australia and South Africa: Too Far or Not Far Enough?*' (2005) 11 *J Int Mar L* 409 and P. Glover '*Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: a Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*' (2008) 22 *A & NZ Mar LJ* 99.

<sup>29</sup> I say 'yet' because in the deliberations concerning the revision of the 1952 Arrest Convention at the CMI in 1999 the United Kingdom delegation, with the support of the Netherlands, Belgium, Japan, Canada, Australia, France and the CISL proposed an 'associated ship' arrest provision modelled on the South African provisions. F Berlingieri *Arrest of Ships* 4<sup>th</sup> Ed., (2006) 576 and 580. However the proposal did not attract the support of the majority of delegations. See the Report of the United Nations/International Maritime Organisation Diplomatic Conference on Arrest of Ships, GE 99-52433 (19/7/99), Chap II, paras 8 and 12. The question whether this would be a desirable international solution to the perceived problem of 'one-ship companies' is beyond the scope of this study. It involves

the result South Africa has stood alone for a little over twenty-five years (at the time of writing) in exercising a jurisdiction to arrest vessels in actions *in rem* on a basis different from and more extensive than any jurisdiction exercised by any court sitting in maritime matters anywhere else in the world. This work seeks to analyse the nature of this novel action *in rem*. That involves a review of how the jurisdiction came about; its nature and impact; the problems to which it gives rise and the making of some modest suggestions concerning the road ahead. But first some consideration must be given to historical matters.

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issues of policy that will vary from country to country and the attempt to introduce it exposed substantial rifts between ship-owning states and trading nations.

## CHAPTER 2

### THE PREVIOUS LEGAL LANDSCAPE

The associated ship jurisdiction has two central elements. Firstly, within the framework of the action *in rem*, which South Africa has inherited from England and the days when Natal and the Cape Colony were British colonies, it permits the arrest of vessels other than those in respect of which the claim to be adjudicated arose. Whilst this extends the traditional basis of the action *in rem* as applied in South Africa until 1983<sup>1</sup> the concept of arresting property other than that in respect of which the claim had arisen was not itself entirely novel. Under South African law all the property of a foreign debtor was liable to attachment to found jurisdiction, whether the cause was a maritime one or otherwise, and in principle all the property of a debtor was subject to seizure in most European jurisdictions, although this was now limited in the case of maritime claims in countries that subscribed to the Arrest Convention. Even in England the adoption of the Arrest Convention by way of the Administration of Justice Act, 1956<sup>2</sup> permitted the arrest of a sister ship. The second element and the true novelty lay in the fact that the associated ship jurisdiction permits the arrest of property not in the legal ownership of the party who is liable for the debt. Here the reform steps beyond the confines of not only the Arrest Convention but also the conceptual scope of the Roman-Dutch jurisdiction based upon an attachment *ad fundandam et confirmandam jurisdictionem*. This latter element of the reforms embodied in the introduction of the associated ship jurisdiction is the truly radical innovation.

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<sup>1</sup> Shaw, *Admiralty Jurisdiction and practice in South Africa* 27 suggests that until the decision in *The Beldis* 1936 P 51 'it was by no means finally accepted' that only the wrongdoing ship could be arrested. See the judgment of Fry LJ in *The Heinrich Bjorn* (1885) 10 PD 44 at 53-4. W Tetley, *Maritime Liens and Claims* (1997) 975-7. Some suggest that this should be a logical consequence of the acceptance of the procedural theory of the action *in rem* but G Price, *The Law of Maritime Liens* (1940) 15 notes that: 'For more than 150 years there is no record of any attempt to bring an action *in rem* by the seizure of property unconnected with the facts out of which the plaintiff's cause of action arose.'

<sup>2</sup> (1956) 4 to 5 Eliz 2 c 46. This change was a novelty in England. *The St Elefterio* 1957 P 179 185. This extended jurisdiction *in rem* was not part of South African admiralty law prior to the Act. *Tharros Shipping Corporation SA v Owner of the Ship 'Golden Ocean'* 1972 (4) SA 316 (N).

It is helpful in order to place this novel development in context to examine the development of the legal landscape in South Africa up to 1983 and where they can be discerned the underlying reasons for that development. One can then determine whether the associated ship jurisdiction can be regarded as an extension of existing legal policy, a decisive break with the past or possibly a combination of the two. It will also identify the conceptual foundation on which the Act is constructed in order to determine the nature of the action *in rem* against an associated ship. In the first place this requires a consideration of the origins of the two procedures available in South African law prior to the Act namely the action based on an attachment *ad fundandam et confirmandam jurisdictionem* and the action *in rem*.

# 1 The Roman-Dutch law and the attachment *ad fundandam et confirmandam jurisdictionem*

In Roman law the central principle on which jurisdiction was based was summed up in the maxim *actor sequitur forum rei*, which required a plaintiff to sue a debtor in the court of the latter's domicile. As such it has been said that the arrest to found jurisdiction was unknown to Roman law<sup>3</sup> and Wessels locates the development of a jurisdiction based on arrest in 'some Germanic or other custom, which was so inveterate that it survived the introduction of the Roman law and practice into Holland'.<sup>4</sup> The origin of those customs is not clearly identified but it seems

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<sup>3</sup> J H Wessels, *History of Roman Dutch Law*, 678. Voet 2.4.18 (Gane's translation, Vol 1, p 283) however appears to take a different view. He writes: 'The detention and laying on of hands, taking place as it does merely in security of a creditor whose debt is in danger, and having its foundations in necessity, is so far from being opposed to either the theory or the practice of Roman law that it should rather be deemed to have been drawn from that law and transferred with the best of reason to our usages.' In the context however he appears to be referring to a practice of arresting the person or property of a fugitive debtor, which is more akin to the arrest *suspectus de fuga* than an arrest to establish jurisdiction. Elsewhere he says simply that this type of arrest arises from custom (Voet 5.1.66).

<sup>4</sup> Wessels, *op. cit.*, 675. This explanation was accepted by the Appellate Division (as it then was) in *Thermo Radiant Oven Sales Limited v Nelspruit Bakeries (Pty) Limited* 1969 (2) SA 295 (A) 305 relying also on Bort, *De Arresten*, 1-7. See also *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A) 918E-G. However, there is room for some reservations whether it is correct. In considering the origins of the action *in rem* reference is made to the procedures laid down for the trial of maritime disputes in various tribunals, which undoubtedly had their origins in Roman civil procedures. If one compares these with the discussion of court procedures in Voet Book 2, Titles 4, 5, 6, 8 and 11 (Gane's Translation Vol 1), Huber, Book V, Chaps 1 - 3 (Gane's Translation, p181 *et seq*) and Van Leeuwen's *Roman Dutch Law*, Book V, Chapters XIII and XIV it will be seen that the latter reflect a procedure that

clear that with the fragmentation of Europe after the collapse of the Roman empire and thereafter the creation and collapse of the Frankish empire, courts in various places began to draw a distinction between those who lived permanently in a place - the *incola* or *inwonende vreemdeling* - and those who did not reside permanently but had only some temporary presence there - the *peregrinus* or *uitwonende vreemdeling*. The former enjoyed the same private law rights as a citizen whilst the latter did not. In various places in Germany, France and, most importantly from a South African perspective, in Holland and most of the provinces of the Netherlands (Friesland appears to have been an exception) the *incola* was permitted initially to arrest a *peregrinus* debtor in order to establish the jurisdiction of the local court, that is the court within whose area of jurisdiction the *incola* resided. At some stage after this initial development it was extended by permitting the debtor's property to be arrested for the purpose of establishing jurisdiction.

Initially and particularly when the arrest was directed at the person of the debtor rather than his property it seems the arrest was not itself the source of jurisdiction but was intended to coerce the *peregrinus* into demanding to be brought before the local judge. This was an act which would be taken as a submission to the jurisdiction and would result in the debtor's release from arrest provided security was given.<sup>5</sup> The arrest of property appears to have become an alternative to the arrest of the person - initially probably when the person of the debtor was not available - and thereafter on a theory of contumacy. Either procedure served the dual purposes of compelling a

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is markedly similar. *Voet* 2.4.13 refers to the original Roman method of compelling the defendant's appearance and notes that this was replaced by a practice of asking for and obtaining security or bail for appearance. It may be that the old Roman practice resurfaced in a different form at a later stage and was adapted to meet the needs of the time. *Van Leeuwen* 5.7.2 says that: 'This practice was formerly unknown, but it has been introduced among us everywhere by statute and custom, according to the rule already mentioned that arrest founds jurisdiction.'

<sup>5</sup> Peckius, *De jure sistendi* 2.6. Merula *Manier van Procederen* 4.2.25 refers to it in the following terms: 'Ook op arresten ... daar door de persoon word bekommert, over zulks Kommer-recht, of syne Goederen, toegeslagen, door dien Toeslag genaamt, ten einde hy door verdriet van t'Arrest eindelyk gedrongen zy te Comparen voor den Juge.' The third category of persons identified by him as subject to arrest includes a 'vreemdeling'. Bort, *De Arresten* 1,12. Wessels, *op. cit.* 678-679 cites this passage from Merula and translates the passage from Bort as: 'Arrests have been introduced by us in order that the arrested person, affected by the worry of his arrest, may appear before the local judge and pay the debt or give security that he will appear before the court and pay the amount of the judgment, so that lawsuits may be cut short and the costs or expenses avoided which are necessarily incurred when a foreign debtor domiciled in another country has to be sued there.'



submission to the jurisdiction and providing security for satisfaction of the judgment. Where the *peregrinus* sought to sue an *incola* he would be compelled to furnish security for the latter's costs in defending the suit. Thus *peregrini* were placed at a disadvantage in relation to an *incola* on whichever side of the lawsuit they found themselves.

Whilst no doubt Wessels is correct in suggesting that a measure of antipathy towards foreigners, perhaps amounting to xenophobia, may have underlain these measures<sup>6</sup>, the more pragmatic commercial reason suggested by writers such as Peckius<sup>7</sup> and Bort<sup>8</sup>, namely that it was to assist local citizens, particularly merchants, in securing payment of their claims without having to go to the trouble, inconvenience and expense of pursuing foreign debtors in the courts of their domicile, seems likely to have been the principal driving force underlying the development of the law in this direction. The ability of the *incola* to sue in his domestic court under procedures, laws and judges with which the *incola* would be familiar, when coupled with the savings in time, trouble and money attendant upon not having to travel to the forum of the other party, provide such an obvious and overwhelming advantage to the *incola* that it is not surprising that later writers such as Voet<sup>9</sup>, Sande<sup>10</sup> and Van Leeuwen<sup>11</sup> all confirm the view that the foundation of the

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<sup>6</sup> Wessels, *op cit*, 679.

<sup>7</sup> Peckius, *De jure sistendi* 2.6

<sup>8</sup> Bort, *De Arresten* 1, 12 *et seq.*

<sup>9</sup> Voet 2.4.22 (Gane's translation, Vol 1, 287) where it is said: 'The object is to give creditors greater ease in suing their debtors living under another judge, and to enable them to litigate in the place of their own domicile with less expense and annoyance. If they lacked this remedy they would be bound as plaintiffs to seek the forum of a foreign defendant, and to be away from the place of their own domicile at the cost of their private estates and at heavier expense.' He adds: 'It appears to have been brought in firstly to favour and to meet the needs of commercial transactions in order that everyone might so contract more freely and generously with foreign merchants - a thing which would be more difficult for him if lacking this power of arrest he were bound to force them to payment in their own proper forum.' This explanation was accepted by the Full Court in *Springle v Merchants Association of Swaziland* 1904 TS 163 and by Steyn J in *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading (Pty) Ltd* 1953 (3) SA 529 (W) 532.

<sup>10</sup> Sande, *Decisiones Frisicae* 1.17.3

rule was commercial convenience.

This practice of the courts of Holland appears not to have been universal. Thus Huber<sup>12</sup>, whilst accepting the rule as applicable in Holland ‘for the convenience and advantage of the creditor, to the end that he should not be obliged to pursue the debtor to a distance’<sup>13</sup> makes it clear that it was not the general practice to permit such an arrest in Friesland in the absence of some other *ratione jurisdictionis* such as the fact that the contract had been concluded or the delict committed within the area of jurisdiction of the Frisian courts. Wessels<sup>14</sup> understands Groenewegen<sup>15</sup> to refer to the French practice, which seems to have been to the same effect as Friesland, and concludes<sup>16</sup>:

‘Every writer points out how peculiar and unusual this practice of the Dutch courts was, and how it was based on the theory that by worrying the foreigner by arrest you indirectly compel him to allow the local judge to try the dispute between the *incola* and himself. Why should the *incola* go to another country if the foreigner owed him a debt *ex contractu alibi facto*, when the whole doctrine of arrest is based on the ground that the *incola* must be protected against the foreigner? It was to save the *incola* the expense of a costly law suit in a foreign country that the Court allowed him to obtain judgment and to levy execution in his own province.’

As with many questions of Roman-Dutch law and practice, in the early days of South

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<sup>11</sup> Van Leeuwen, *Het Roomsche Hollands Regt* (Kotze’s translation) 5.7.2 which reads: ‘An arrest may also take place solely for the purpose of expediting the pleadings, so that finding my debtor in the place where I live I can sue him with greater convenience and less expense than proceeding against him before the judge of his own domicile.’

<sup>12</sup> Huber, *Hedensdaegse Rechtsgeleerdheid* (Gane’s translation) 4.31.6

<sup>13</sup> Huber, *op cit*, 4.31.3 cited in *Maritime & Industrial Services Ltd v Marcierta Compania Naviera S A* 1969 (3) SA 28 (D) 32D-E.

<sup>14</sup> Wessels, *op cit*, 687.

<sup>15</sup> Groenewegen, *De legibus abrogatis ad code* 3.18.4. It is not clear that Wessels is correct in that approach as the relevant passage refers not only to the French practice but also to the practice in the Low Countries. It must be borne in mind that Groenewegen, who lived in Delft, was providing a commentary on the *Corpus Iuris Civilis* insofar as that was no longer applicable. In this passage, having referred to the general rule, he goes on to say: ‘And I have no doubt at all that this custom of ours has been the cause of the present day practice of arresting debtors and they are very common among us.’ See also Voet 2.5.22.

<sup>16</sup> Wessels, *op cit*, 687.

African jurisprudence differences arose between various courts as to the proper interpretation of the Roman-Dutch authorities. In the Cape the Supreme Court, in reliance on Voet and Groenewegen, took the view that arrest of the person or property of a *peregrinus* at in the instance of an *incola* was not a sufficient ground for the exercise of jurisdiction over the *peregrinus* in the absence of some other *ratione jurisdictionis*.<sup>17</sup> The Transvaal court, however, held a different view.<sup>18</sup> The views of the Natal court are unclear reflecting rather more the poor quality of that Bench in those days and its unfamiliarity (with the notable exception of Connor CJ) with the Roman-Dutch authorities<sup>19</sup> than any profound insight. In its leading judgment on the topic<sup>20</sup> the principal judgment by Bale CJ expressed the view that the process of arrest served two purposes of which the first was:

‘... for the establishing, founding, confirming or strengthening of jurisdiction - I do not think that we are concerned in this case as to which is the right phrase, the question is to some extent an academic one.’<sup>21</sup>

The question was by no means academic as a reference to the Cape and Transvaal cases show<sup>22</sup> but the Natal court dismissed the difference and arrived at the same result as the Transvaal in reliance *inter alia* on the Cape decisions.

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<sup>17</sup> *Einwald v The German West African Company* (1887) 5 SC 86; *Ex parte Kahn* (1907) 24 SC 558; CP Van Zyl, *The Judicial Practice of South Africa*, 3 Ed. (1921), Vol. 1, 223.

<sup>18</sup> *Cloete v Benjamin* 1 SAR 180; *Lecomte v W & B Syndicate of Madagascar* 1905 TS 696.

<sup>19</sup> P Spiller, *A History of the District and Supreme Courts of Natal 1848-1910* quotes Bale CJ as saying about himself that he ‘lacked the great and inestimable advantage of a university education’ (p 39). On the same page Spiller comments that: ‘The limitations in Bale CJ’s background showed in his subsequent judicial career.’ The other two judges in that case were amongst those of whom Spiller writes (at 51) that they left the Supreme Court in a rather forlorn condition and lacked sufficient legal expertise ‘especially in the prevailing Roman-Dutch law’.

<sup>20</sup> *Dickinson & Fisher v Arndt & Cohn* (1908) 29 NLR 206

<sup>21</sup> At 208.

<sup>22</sup> As indeed did a reference to the article by Wessels J in (1907) 24 SALJ 390 which was cited in the judgment and which is largely reproduced as Chapter 25 of Wessels *History of the Roman-Dutch Law*.

This inter-provincial disagreement<sup>23</sup> was resolved when the Cape court recanted and reversed its previous position.<sup>24</sup> In the result in the first major work on the law of jurisdiction in South Africa Pollak was able to write:

‘That an *incola* of the area to which the court belongs can secure the attachment of the property of a *peregrinus* to found jurisdiction even though the cause of action arose outside such area is well established.’<sup>25</sup>

Facilitating claims by South African claimants against foreigners was therefore something well established in our law before 1983. Provided the person of the foreigner or more probably its property within the court’s area of jurisdiction<sup>26</sup> had been attached a South African court would exercise jurisdiction. Whilst arrest of the person remained feasible<sup>27</sup> in most cases the type of debtor embroiled in this kind of dispute would be a foreign corporate entity and the attachment would be directed to its property.

Alongside this jurisdiction for the benefit of *incolae* there had also been developments that assisted *peregrini* to some degree. A *peregrinus* had always been entitled to sue an *incola* in the courts of the latter’s domicile. That was the necessary implication of the principle *actor sequitur forum rei*. Obstacles were placed in the path of the foreigner by the requirement that he furnish

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<sup>23</sup> HDJ Bodenstein, ‘*Arrest to found Jurisdiction*’ (1917) 34 SALJ 193 and 457 not only espoused the Transvaal position but went further and concluded that even a *peregrinus* could found jurisdiction by way of an arrest irrespective of whether any other *ratione jurisdictionis* was present. However, Van Zyl *op. cit.*, (1921) Vol. 1 222-224 equally strongly espoused the prevailing Cape view.

<sup>24</sup> *Halse v Warwick* 1931 CPD 233. By changing its view in this way the Cape court avoided the need for the issue to be resolved by the Appellate Division as had been the case in the even more famous disagreement between the two divisions over the doctrine of consideration resolved in *Conradie v Rossouw* 1919 AD 279 by a Bench consisting largely of Transvaal members.

<sup>25</sup> W Pollak, *Jurisdiction* (1st ed.) 58.

<sup>26</sup> *Hare v Banimar Shipping Co.* SA 1978 (4) SA 578 (C) approved in *Estate Agents’ Board v Lek* 1979 (3) SA 1048 (A) 1062H-1063A.

<sup>27</sup> The arrest of persons has been outlawed as unconstitutional in *Bid Industrial Holdings (Pty) Ltd v Strang and another (Minister of Justice and Constitutional Development, third party)* 2008 (3) SA 355 (SCA). It now suffices to

security for the costs of the *incola*<sup>28</sup> but access to the local court of the defendant was permitted. At some stage the *peregrinus* was afforded the further benefit available to the *incola* namely the right to arrest the person or the property of his debtor where that debtor was also a *peregrinus* and some other *causa jurisdictionis* existed for invoking the jurisdiction of the court such as that the contract had been concluded or the delict committed within the court's area of jurisdiction. The origin of this practice is obscure<sup>29</sup> but Kotzé JP stated the position as being that:

'... we must remember that strangers, as well as *incolae* could obtain an arrest in Holland; but there was this distinction between the two cases. A stranger could only arrest another stranger, if there existed some ground justifying the granting of an arrest, as where, for instance, the claim or right of action was based on a contract made or to be performed within the jurisdiction of the place where the arrest was applied for; whereas an *incola* could arrest a stranger or *peregrinus* on any cause of action arising anywhere beyond the jurisdiction.'<sup>30</sup>

However, the distinction identified by Kotzé JP does not appear to have been drawn in that clear fashion by the Roman-Dutch writers. Professor Bodenstein in his well known article on the topic of arrests to found jurisdiction<sup>31</sup> argued strongly that *peregrini* were in the same position as *incolae* insofar as arrests of person or property to found jurisdiction was concerned and that accordingly an arrest could take place at the instance of a *peregrinus* to found jurisdiction over another *peregrinus* even though no other *ratione jurisdictionis* existed. That view was not endorsed by the South African courts which held in a series of cases<sup>32</sup> that the entitlement of a

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obtain jurisdiction over a natural person that the summons was served whilst the defendant was in South Africa and there is an adequate connection between the suit and South Africa.

<sup>28</sup> Wessels, *op cit*, 677.

<sup>29</sup> For example whilst Voet deals extensively (2.4.30-2.4.58) with instances where arrest is impermissible he never specifically addresses the question of who is entitled to seek an arrest. The inference that this was permissible is drawn from a passage in Voet 2.4.45 that refers to two foreigners litigating where one has arrested the property of the other.

<sup>30</sup> *Cape Explosives Works Ltd v South African Oil and Fat Industries Limited* 1921 CPD 244 at 268.

<sup>31</sup> Bodenstein (1917) 34 SALJ 198, 457.

<sup>32</sup> The cases are collected in Pollak, *op cit*, 62 and *Frank Wright (Pty) Limited v Corticas 'B.C.M.' Limited* 1948 (4) SA 456 (C) at 465. The Natal court took a different view but eventually fell into line with the judgment in *Maritime & Industrial Services Limited v Marcierta Compania Naviera SA* 1969 (3) SA 28 (D). Pollak, *op cit*, 62-63 had

*peregrinus* to an order for the attachment of the personal property of another *peregrinus* depended on the existence of some other ground of jurisdiction namely that the contract in respect of which the claim arose was entered into or fell to be performed within the area of jurisdiction of the court or that the cause of action arose there.

Whilst one can well understand that the practice of permitting the arrest of the personal property of a *peregrinus* in order to found jurisdiction in a suit against the *peregrinus* at the instance of an *incola* would serve the local commercial interests of *incolae*, as indeed was asserted by the Roman-Dutch writers to be the reason for the practice, it is less easy to see why it should have been extended<sup>33</sup> to foreigners at all or why, once it had been extended, a limitation should have been imposed on foreigners that did not apply to *incolae*. The obscurity which veils the circumstances in which *peregrini* came to enjoy this privilege does not permit an opinion to be expressed. It may have been that foreign merchants insisted on receiving the same benefit of approaching the courts as local residents, at least where the cause of action arose or the contract was concluded or fell to be performed within the court's area of jurisdiction. It may be that it was thought unfair to exclude them in those circumstances whilst drawing the line at instances where neither litigants nor subject matter had any connection with the court.<sup>34</sup> It may simply have been due to inadvertence. But all this is mere speculation. What it illustrates is that in relation at least

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correctly written in 1937 that the Natal position was untenable in the light of the judgment in *The Owners Master and Crew of the SS Humber v The Owners and Masters of the SS Answald* 1912 AD 546.

<sup>33</sup> The word 'extended' may be misleading. It may be that *peregrini* were entitled to invoke this benefit alongside *incolae* at all times but the position is unclear. If Professor Bodenstein is correct then the South African courts have restricted the rights of *peregrini*.

<sup>34</sup> Pollak, *op cit*, 52-3 advances this suggestion when he says: 'The distinction although it purports to be based upon the Roman-Dutch law, was apparently unknown to the Roman-Dutch law, but it can be justified on the grounds of fairness to litigants and on the further ground that the time of South African courts should not be taken up with disputes which are unconnected with South Africa when such disputes occur between people who themselves have no connection with South Africa.' In *Maritime and Industrial Services Ltd v Marcierta Compania Naviera SA*, *supra*, 34H Van Heerden J expressed the view that : 'There seems to be no good reason why by mere attachment *peregrini* defendants should be put to the inconvenience and expense of defending actions in South African Courts at the instance of *peregrini* plaintiffs and why in the process the time of South African Courts (which may have to apply foreign law in deciding such disputes) and State funds should be taken up with disputes which are unconnected with South Africa and between persons who have no connection with South Africa.' The same underlying philosophy appears to have motivated the comments of Didcott J in *Katagum Wholesale Commodities Companies*

to practical matters such as the extent of a court's jurisdiction the law does not necessarily develop along consistent lines nor does it necessarily flow from any central defining principle.<sup>35</sup> If Professor Bodenstein is right in his view that there never was a distinction between *incolae* and *peregrini* in regard to arrests to found jurisdiction then the search for a principle becomes fruitless because the law as laid down by South African courts proceeds on the basis of a misunderstanding of the Roman-Dutch law. If Professor Bodenstein is wrong then a right given to *incolae*, largely for reasons of commercial advantage, was afforded or extended to *peregrini* to some degree but not to the full extent and we have no means available to discern why this was so. At best it can be said that the law reflects some compromise between conflicting interests and policies the contents of which are not entirely discernible at this stage.<sup>36</sup>

To sum up then the position at the 1<sup>st</sup> November 1983 was that South African courts, sitting as such and not as Colonial Courts of Admiralty, could exercise jurisdiction in maritime matters in two broad classes of cases. Where the claimant was an *incola* of the court and the defendant a *peregrinus* of South Africa, jurisdiction could be established by attaching *ad fundandam et confirmandam jurisdictionem* the property of the defendant found within the area of jurisdiction of the court irrespective of whether the dispute between the parties had any other connection with

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*Ltd v The mv 'Paz'* 1984 (3) SA 261 (N) 263H and was echoed by Harms JA in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) 755E-G.

<sup>35</sup> Pollak (1st ed.), *op cit*, 15-20 contended that the principle of effectiveness underlies the exercise of jurisdiction by our courts and this view has largely been accepted. *Thermo Radiant Oven Sales (Pty) Limited v Nelspruit Bakeries (Pty) Limited*, *supra*, 307A-B; D Pistorius, *Pollak on Jurisdiction* (2<sup>nd</sup> Ed.) 4. However as Pollak himself pointed out in the original edition of his work and Potgieter JA in *Thermo Radiant Oven Sales Limited* accepted (at 309D-F) it has long been the practice in our courts to authorise attachments of property of trifling value to found jurisdiction even though the claim far exceeds the value of the item. It is clear that this undercuts the principle of effectiveness in the case where jurisdiction is established at the instance of an *incola* without any guarantee that the resulting judgment will be effective. If effectiveness were the only applicable principle there would be no good reason for the law denying a *peregrinus* the right to arrest valuable property such as a ship in order to found jurisdiction in circumstances where the fact of the arrest would give rise to every prospect that a judgment would be effective. If like counsel in *Smit v Cramer* 1913 OPD 123 127 this means that I have mixed up in my own mind jurisdiction and the exercise of jurisdiction that is a reproach to be borne with fortitude.

<sup>36</sup> Oliver Wendell Holmes, *The Common Law*, 1 (Dover edition) claims that the origins of law can be found in: 'The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men ...' One would add, particularly in relation to statutory accretions, that inadvertence and lack of foresight of the full consequences of a particular measure may bring about surprising results when the law is applied to situations not contemplated by its authors.

that court. Where both parties were *incolae* of South Africa but the defendant was a *peregrinus* of the court or both were *peregrini* of South Africa, jurisdiction would only be exercised if the cause of action arose or the contract was concluded or fell to be performed within the area of jurisdiction of the court and, in the case of a *peregrinus* defendant, provided property of the defendant within the area of jurisdiction of the court had been subjected to attachment.<sup>37</sup>

Not surprisingly there were cases, largely of a maritime nature, where *peregrini* sought to exploit the favourable position of the *incola* by ceding their claims to an *incola*<sup>38</sup> but the Appellate Division sounded the death knell of that practice in *Skjelbreds Rederi A/S and others v Hartless (Pty) Limited*<sup>39</sup> where it held that the cession in question was a disguised transaction falling foul of the principle in *Zandberg v Van Zyl*.<sup>40</sup> The court held that because the deed of cession required the cessionary to account to the cedent for any proceeds accruing from the successful pursuit of the claim the true characterisation of the relationship was that the ‘cedent’ constituted the ‘cessionary’ as its mandatary to recover the claim.<sup>41</sup> Whether that judgment is correct<sup>42</sup> in its analysis of the cession in question is now academic insofar as maritime matters are concerned, but it undoubtedly lent further urgency to the process nearing completion at that time

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<sup>37</sup> Whilst the person of the defendant could be arrested this was and is sufficiently rare in practice that it can for the purposes of this work be safely ignored. Whilst the old authorities refer to the arrest of property for many years now the prevailing terminology has been to speak of an arrest of the person and an attachment of property.

<sup>38</sup> These were usually special purpose companies established by local attorneys for the purpose of receiving the claim, pursuing it by litigation and accounting for the proceeds.

<sup>39</sup> 1982 (2) SA 710 (A). Prior to that the practice had been upheld in cases such as *Bird v Lawclaims (Pty) Limited* 1976 (4) SA 726 (D) and *Hare v Banimar Shipping Co. SA, supra*.

<sup>40</sup> 1910 AD 302 309. See also *Commissioner of Customs and Excise v Randles, Bros. & Hudson Limited* 1941 AD 369 395.

<sup>41</sup> At 736A-C.

<sup>42</sup> In *Hippo Quarries (Tvl) (Pty) Limited v Eardley* 1992 (1) SA 866 (A) 876A-H Nienaber JA distinguished the judgment in *Skjelbreds, supra*, and held that it had to be confined to its own particular facts. He was considering a cession designed to render a person liable as surety for a debt for which they would otherwise have had no liability at all. The cession served a secondary purpose for the ultimate benefit of the cedent because no consideration was given for it and the cessionary was under a duty to account to the cedent for any proceeds recovered. It is hard to see why that should stand on any different footing from a cession designed to circumvent a jurisdictional impediment.



to reform the jurisdiction of the courts in maritime cases.

The implications of this for maritime cases in the parochial courts was that they exercised a jurisdiction that was in some respects wider and in others (as we shall see) narrower than their jurisdiction when sitting as admiralty courts. In maritime matters the property arrested was not confined to the ship in respect of which the claim had arisen but could extend to any property owned by the owner of that vessel. Thus a sister ship could be arrested without resort to the provisions of the Arrest Convention as could the freight due to a shipowner or the bunkers aboard a chartered vessel. In that sense the scope of potential jurisdiction was wider than in admiralty cases. However the restriction imposed by the fact that the claimant had either to be an *incola*, or in the case of a *peregrinus* that the claim had to have a jurisdictional connection with South Africa, severely limited the scope of the court's jurisdiction and made it narrower than in admiralty. Against that background we turn to trace a similar historical route for the action *in rem*.

## 2. English Admiralty law and the action *in rem*

Readers may well think that the origin of the attachment to found jurisdiction in Roman Dutch law is obscure and the reasons for the development of at least some aspects of this procedure unclear. They may also think that its reception into South African law is confusing, illogical and lacking any central organising principle. If so they are unlikely to find any solace in an investigation of the origins of the action *in rem* which superficially at least appears to be its counterpart in admiralty proceedings. Much ink and industry has been spent on matters relating to this investigation<sup>43</sup>. However, whilst the results of this research are fascinating to anyone

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<sup>43</sup> Fascination with the subject is endless. Most modern text books find it necessary - as has the present writer - to sketch at least some of the background to the development of admiralty law and jurisdiction particularly in England. See in this regard *Benedict on Admiralty*, 7<sup>th</sup> Ed (Revised) Vol. 1, Chapters 1-3; *Moore's Federal Practice*, 3<sup>rd</sup> Ed, Chap 701; G Gilmore and C L Black, *The Law of Admiralty*, 2<sup>nd</sup> Ed., (1957) pages 1-11 and 586-594; Shaw, *op cit*, 25-31; 51-56; D R Thomas, *Maritime Liens* (1980), 1 - 9; T J Schoenbaum, *Admiralty and Maritime Law* (1987) 1-18; W Tetley, *Maritime Liens and Claims*, 2<sup>nd</sup> Ed (1997), 1-56; D C Jackson, *The Enforcement of Maritime Claims*, 2<sup>nd</sup> Ed (1996), 10 -15; J Hare, *op cit*, (2009) 4-16; *Halsbury's Laws of England* (Mackay Ed) (4<sup>th</sup> Ed. 2001 Re-Issue)

interested in maritime law few certainties emerge in regard to the key questions of when, where and how the action *in rem* developed and what the underlying rationale was for that development. The investigator may readily be tempted to abandon the search and claim that like Topsy the action *in rem* just grew<sup>44</sup>. Tempting though that approach may be - and remarkably accurate in the result - it is helpful to essay a brief historical survey by way of background to the changes wrought by the Act. This enquiry must precede any consideration of the introduction of English admiralty law into South Africa.

The difficulties facing the modern researcher seeking the roots of the action *in rem* and the reasons for its existence lie partly in the fact that one is seeking to penetrate the numerous veils that the passage of time draws across past events and partly in the fact that a large portion of the available material is concerned more with the origins and jurisdiction of admiralty courts and the law applied therein, particularly the source of the concept of the maritime lien, than with the nature and source of the proceedings in which that jurisdiction was exercised and that law applied.<sup>45</sup> In addition until the time of Lord Stowell at the end of the 18<sup>th</sup> Century there were no

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Vol. 1(1) paras 301-306; Kennedy & Rose, *Law of Salvage*, 6<sup>th</sup> Ed (2002). One of the more comprehensive considerations of the topic is by T L Mears in an article entitled '*The History of the Admiralty Jurisdiction*' printed in *Select Essays in Anglo-American Legal History*, Vol 2 (1908) 312. An interesting survey is contained in Bourguignon H J, *Sir William Scott, Lord Stowell*. (Cambridge University Press, 1987), 1-30. The author finds it unnecessary to mention either the action *in rem* or the maritime lien perhaps indicating that the concern with both of these is a later development of the Admiralty law.

<sup>44</sup> 'Do you know who made you?' 'Nobody as I knows on', said the child, with a short laugh. ... 'I 'spect I grewed. Don't think nobody never made me.' Harriet Beecher Stowe, *Uncle Tom's Cabin*, chap. 20. Wiswall, *op cit*, 166 in his chapter on '*The evolution of the action in rem*' confesses an incapacity to express any firm view on the question.

<sup>45</sup> One of the most accessible sources of the general material on the development of maritime law, which includes the text (in English) of most of the more notable ancient maritime laws, is Benedict, *op cit*. F L Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800*, is a helpful survey of the most significant period of development of English admiralty law. His central premise is not, however, one that I share. Tetley *Maritime Liens and Claims* (1997) likewise has a reasonably full survey of the history. Earlier books that may be less accessible are Williams and Bruce *Admiralty Practice*, 3<sup>rd</sup> Ed. (1902); E C Mayers, *Admiralty Law and Practice in Canada* (1916); G Price, *Law of Maritime Liens* (1940), E Roscoe, *Admiralty Jurisdiction and Practice*, 5<sup>th</sup> Ed. (1931); W Holdsworth, *History of English Law*, vols.1, 5, 8, 12, 15 and 16 (7<sup>th</sup> Ed, 1956, Reprinted 1971). Sir Walter Phillimore's articles on *The High Court of Admiralty* and *Admiralty Jurisdiction* in the *Encyclopaedia Britannica*, Vol 1 (1957) 171-174 (reprinted from the famous 1911 edition) are interesting as his father Sir Robert Phillimore had been the last Admiralty Judge. Roscoe incorporates Williams and Bruce, but departs from it in significant respects. Particularly helpful articles are those by PM Hebert, '*The origin and nature of maritime liens*' (1929-30) 4 Tulane Law Review 381 and E Ryan '*Admiralty jurisdiction and the maritime lien: An Historical Perspective*' (1968) Western Ontario Law Review 173. No consideration of the topic is complete without reference to A Browne, A

law reports of the decisions of the Court of Admiralty. However obscure and fragmentary this material is it is nonetheless possible to distil certain things from it that may be of assistance. In order to place it in appropriate perspective it is convenient to start at the very beginning of the development of maritime law.

(a) **The roots of maritime law**

Ships and maritime commerce are part of the earliest history of humankind.<sup>46</sup> With commerce came disputes and the need for these to be resolved by courts. It is no surprise then to find reference to maritime matters in ancient codes of law such as those of Hammurabi<sup>47</sup> and the Digest of Justinian.<sup>48</sup> These were followed in the 7<sup>th</sup> or 8<sup>th</sup> Century CE by the Byzantine compilation known (inaccurately) as the Rhodian Sea-law and in the 9<sup>th</sup> Century CE by that portion of the Basilica - the codification of Byzantine law undertaken at the instance of Emperor Basil 1 - that deals with maritime law. At a later stage with the development of maritime trade across southern Europe and the Mediterranean and along the western coastline of Europe a number of collections of maritime laws evolved and were assembled in the form of codes. The best known of those that survive are the Rôles (or Laws) of Oléron<sup>49</sup>, the Tablets of Amalfi;<sup>50</sup> Il

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*Compendious View of the Civil Law and the Law of Admiralty*, Vol 2 (1802). Of recent publications the introduction to *Hale and Fleetwood on Admiralty Jurisdiction* (Eds M J Prichard and DEC Yale)(Selden Society), Vol 108 (1992) makes a substantial advance in our understanding of the origins of the action *in rem*.

<sup>46</sup> Benedict, *op cit*, ss 2 and 3, pp 1-3 to 1-13; Gilmore and Black, *op cit*, s 1-2, pp 3-5; Schoenbaum, *op cit*. s 51-2. pp 2-3.

<sup>47</sup> Benedict, *op cit*, s 2, p 1-3 fn 1.

<sup>48</sup> D 14.1.1 to 7 and 14.2.1 to 14.2.10 (Mommsen, Krueger and Watson translation, Vol 1 , 415 -422).

<sup>49</sup> These exist in various forms in the 30 known manuscripts. *The Black Book of the Admiralty* (Ed. Twiss) contains The Laws of Oleron in Vol. 1, 88-131 and Vol 2, 210-241 and has other documents from Oleron in Vols. 2, 244-397 (the Customary of Oleron) and 3. Tetley *Maritime Liens and Claims* 13-18 summarises the most recent scholarship by Mr James Shepherd in this regard. In the introduction to *Hale and Fleetwood on Admiralty Jurisdiction*, xxxv, fn 7, the editors comment favourably on the quality of this research. Notwithstanding this research and scholarship the old myth that these were brought to England by Eleanor, Duchess of Aquitaine, as part of her dowry on her marriage to Henry II, is remarkably resilient. *Moore's Federal Practice*, 3<sup>rd</sup> Ed, Vol 29, § 701.01[1], fn 5.

<sup>50</sup> 4 *Black Book of the Admiralty* 3. These date from the 11<sup>th</sup> Century.

Consolato del Mare;<sup>51</sup> the Laws of Wisby<sup>52</sup> and those of the Hansa Towns.<sup>53</sup>

Whilst this history is well established two things of relevance to the present study seem to be clear from a consideration of these ancient laws. The first is that although they developed and were published in different places they reflected in broad and general terms a *lex maritima* or customary law relating to maritime matters that generally transcended national divisions and was concerned to be of general application irrespective of where it was being applied. This common approach is reflected in the widespread use in the maritime courts that developed initially in the Italian city states in the Eleventh Century and subsequently in Barcelona and Valencia; Marseilles and French ports on the Atlantic coastline; England; the Hanseatic towns and elsewhere, of compilations of maritime laws and decisions such as the Rôles of Oleron and the II Consolato del Mare. These courts were usually separate from the ordinary courts and often staffed by persons chosen by the merchants themselves to adjudicate their disputes.<sup>54</sup> Leaving legal theory aside, commercial reality and the requirements of trade would have dictated in those circumstances that the courts in different ports give similar answers to similar questions. Merchants and seafarers trading between England and France or Italy and the Levant would have required reasonable consistency in the resolution of the ordinary disputes that arise in the course of maritime trade. If a master were forced to jettison goods in the course of a storm it would have

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<sup>51</sup> 3 *Black Book of the Admiralty* 37-657 under the heading *Les Bones Costumes de la Mar*. According to Benedict, *op cit*, 1-27 these were first printed in 1494 but their origins are more ancient. The *Judicial Order of the Court of the Consuls* is in 4 *Black Book of the Admiralty* 451.

<sup>52</sup> 4 *Black Book of the Admiralty* 265.

<sup>53</sup> The Hanseatic league was a loosely-organised network of trading cities and was established in 1358. It took its name from merchant guilds or Hansa and eventually became a loose network of anything between 70 and 170 cities. It was finally dissolved in 1862 but it had ceased to be a significant body by around 1600. It included cities such as Lübeck (where it started), Hamburg, Bremen, Brunswick, Cologne, Gdansk, Riga and Tallinn, of which the first three still call themselves 'free and Hanseatic ports'. Benedict, *op cit*, s 11, p 1-28; Gilmore and Black, *op cit*, s 6, fn 21.

<sup>54</sup> D M Walker, *The Oxford Companion to Law*, (1980) 807 *sv* 'Maritime Law' writes that: 'In the trading centres of southern Europe, distinct magistrates and courts administering maritime law arose, and this mode of administering the law was followed in northern Europe. But in England and France, maritime jurisdiction was vested in an Admiralty court.' See *The Judicial Order of the Courts of the Consuls of the Sea*, 4 *Black Book of the Admiralty* 450 where the process of selecting the consuls and the appeal judge in Valencia is set out in chapters 1 to 3.

been most unsatisfactory for the outcome of the resultant disputes to depend on whether this occurred on the outward bound or homeward journey. Consistency of approach is likely to have been dictated by practical and commercial considerations as much as by any particular legal philosophy.<sup>55</sup>

The flavour of this sense (or spirit) of uniformity in maritime law is well captured by comparing the response in Digest 14.2.9 to the petition of Eudaemon of Nicomedia by the Emperor Antoninus namely:

‘I am master of the world but the law of the sea must it be judged by the sea law of the Rhodians, where our own law does not conflict with it.’<sup>56</sup>

with Lord Mansfield’s remark that:

‘... the maritime law is not the law of a particular country, but the general law of nations.’<sup>57</sup>

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<sup>55</sup> Malynes, *Consuetudo vel Lex Mercatoria*, chapter 1, makes it clear that he, writing as a merchant, regards the law of merchants to be universal in its operation and the procedures of the courts and tribunals in different states to be in substance the same. Thus he writes of: ‘The Law of Merchants, hitherto observed in all countries.’ There is an autobiographical note in Holdsworth, *infra*, Vol V, 131-134. According to CS Cumming ‘*The English High Court of Admiralty*’ (1992) 17 Tulane Maritime L J 209 Malynes copied both his ideas and some of the text of his work from a book published in 1590 by Professor Welwood, the professor of civil law at the University of St Andrews, entitled *The Sea Law of Scotland*. It is unclear whether this is an accurate title. W Holdsworth, *A History of English Law*, Vol V, 11 says that Malynes ‘borrowed largely but without acknowledgement’ from Welwood’s *Collection of Sea Laws*, which is included in the 1686 edition of Malynes work. Bourguignon in his biography of Lord Stowell cited *supra* at 59, footnote 1, describes Welwood’s work as ‘a somewhat useful book for seamen, masters and merchants but not for a judge of the admiralty court’. At 21 he cites a passage from a seventeenth century writer making the point that international maritime commerce required a reasonably uniform treatment of common disputes in different jurisdictions in accordance with the civil law as used in countries other than England.

<sup>56</sup> The translation is that of Mommsen, Krueger and Watson. Tetley, *Maritime Liens and Claims*,<sup>8</sup> uses a different and more dramatic translation : ‘I am indeed lord of the world, but the law is the lord of the sea. Let it be judged by the maritime law of the Rhodians, provided that no law of the sea is opposed to it.’

<sup>57</sup> *Luke v Lyde* (1759) 2 Burr 882 897: 97 ER 614,617. Lord Stowell endorsed this in *The Neptune* (1834) 3 Hag., 129, 135; 166 ER 354. This trend towards uniformity is noted by HR Hahlo and E Kahn *The South African Legal System and its Background* 465-6.

Whilst separated by over a millennium both statements convey an understanding of maritime law and a sense of its universality that has always infused this area of the law. It persists in the aims of the Comité Maritime International (founded in 1897) the stated goal of which:

‘... is to contribute by all appropriate means and activities to the unification of maritime law in all its respects.’<sup>58</sup>

This ambitious view of the nature of maritime law has had much success and was probably universally shared until the latter part of the 19th Century when it foundered (at least in England and countries that share its jurisprudential heritage) on the rock of the nation state and the sense of legal parochialism that it engendered, commencing with Brett MR’s statement that maritime law in England is:

‘... not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law.’<sup>59</sup>

More recently Lord Diplock said:

‘Outside the special field of ‘prize’ in times of hostilities there is no ‘maritime law of the world’ as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities in English courts.’<sup>60</sup>

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<sup>58</sup> The goal is stated on the CMI website at <http://www.comitemaritime.org>, which deals with its history, structure and organisation.

<sup>59</sup> *The Gaetano and Maria* (1882) 7 PD 137, 143, 4 Asp MLC 535, 538. See also *The Gas Float Whitton (No. 2)* [1896] P 42 (CA) 47, 48; 8 Asp MLC 110 (CA) 110-1. In the United States, whilst the jurisdiction conferred upon the federal courts under the Constitution to hear all ‘cases of admiralty and maritime jurisdiction’ has always been widely interpreted, rejecting both the statutes passed in England to restrict the admiralty jurisdiction and the writs of prohibition, the Supreme Court has asserted that the maritime law is nonetheless only operative to the extent to which it is part of the law of the United States as derived from ‘our own legal history, Constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.’ *The Lottawanna*, 88 U.S. (21 Wall.) 558 577; 22 L Ed 654 (1875).

<sup>60</sup> *The Tojo Maru* [1972] AC 242, 290; [1971] 1 All ER 1110 (HL) 1133a-d. Professor Tetley remains a proponent of the view that there is a complete legal system of general maritime law separate from any national system. W Tetley, *Maritime Law as a Mixed Legal System* (1999) 23 Tulane Maritime Law Journal 317.

Nevertheless the aspiration to international uniformity is never far from the surface as illustrated by the judgment of Scott LJ in *The Tolten*<sup>61</sup> with its references to:

‘... the general law of the sea amongst Western nations, out of which our maritime law largely grew ...’

and his decision to follow ‘in the wake of Lord Stowell and Dr Lushington’ by resorting to ‘the general law of the sea’ in order to resolve doubt and ‘preserve international uniformity in maritime law’.

The second important feature of the old maritime codes is that they developed alongside the revival of the study of the Roman law that commenced at the University of Bologna from the beginning of the 12<sup>th</sup> century<sup>62</sup> and led to the spread of the Civil Law throughout Europe that occurred thereafter. The result was undoubtedly that the law in regard to maritime matters was heavily influenced by the principles of the civil law and incorporated and adapted the principles and practices of civilian systems into the general body of maritime law. As Gilmore and Black put it:

‘As maritime commerce grew in importance, its law attracted the attention of those Continental legal scholars and commentators who were re-working and adapting to their times the Roman or ‘civil’ law. Treatises and commentaries appearing during and after the Renaissance acquired status as classic systemisations of the subject. Maritime law thus grew up and came of age under the tutelage of the civil law, and it still bears the imprint thus acquired even when administered in the courts of common law countries.’<sup>63</sup>

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<sup>61</sup> *The Tolten* [1946] 2 All ER 372 (CA)

<sup>62</sup> Wessels, *op cit*, chap. XVI, 112-129; Hahlo and Kahn, *op cit*, 489-523.

<sup>63</sup> Gilmore and Black *op cit*, 8. Benedict *op cit*, s 15, 1-32 makes a similar point in the following terms: ‘The admiralty law is indebted for many of its characteristics to the circumstances of the countries in which it was first administered. The countries that earliest reduced the law of the sea to a system, and adopted codes of maritime regulations, having been countries in which the Roman or civil law prevailed, the principles of that great system of jurisprudence were incorporated with, and gave character to, the maritime law; and so much were pure reason, abstract right, and practical justice mingled in that system, and so important was it that the general maritime law should be uniform and universal that, in England, where the common law was the law of the land, the civil law was held to be the law of the admiralty, and the course of proceedings in admiralty closely resembled the civil law and practice.’

In the light of this cross-pollination between the revived Roman law, local custom and the demands of maritime commerce it would be improbable to find that those devices, such as the ability to arrest the person or goods of a debtor, which proved so useful to merchants in pursuing their debtors before local rather than foreign courts, were overlooked or rejected. Indeed one imagines that the case of a disputed debt arising in the course of trade between a local merchant in one of the ports of Europe and a foreign trader whose vessel had put into port to engage in trade with local merchants would provide the quintessential occasion for the invocation of the local jurisdiction by way of arrest of the person or goods of the foreigner. Where the latter was also the master and owner of the vessel on which he travelled the arrest of the vessel itself could be expected. This expectation is reflected in the fact that in maritime courts on the Continent the arrest of vessels was a feature of proceedings as it became also in England.

The English Channel provided no barrier to these developments in the field of maritime law in Europe. It is certain that the foundations of English admiralty law are civilian<sup>64</sup> and the special jurisdiction of the admiralty courts is ancient and probably arose almost concurrently with that of the various similar courts of the Mediterranean and Western Europe. In 1802 Browne<sup>65</sup> wrote that:

‘The court of admiralty is twofold: the instance court, which takes cognizance of contracts made and injuries committed upon the high seas; and the prize court ... The instance court is governed by the civil law, the laws of Oléron and the custom of the admiralty, modified by statute law.’<sup>66</sup>

In regard to procedure Browne wrote:

‘As to practice, how can the practice of the admiralty court be intelligible without

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<sup>64</sup> Wiswall, *op cit*, chap. 3 and footnote 76.

<sup>65</sup> A Browne, *op cit*, a most influential work in the revival of the admiralty jurisdiction in England according to Wiswall, *op cit*. 7. Browne was Professor of Civil Law in the University of Dublin. Bourguignon, *op cit*, 60, fn 1, is less enthusiastic describing it as being of more use to Browne’s students than to Lord Stowell to whom it was dedicated.

<sup>66</sup> Browne, *op cit*, Vol 2, 29.



knowing the practice of the civil law? The Court of Admiralty ... always proceeds according to the rules of civil law...'<sup>67</sup>

Ignoring the Roman law roots of maritime law in the context of the development of the action *in rem* leads to much confusion. A proper understanding of that development is fundamental to the characterisation of the action, a matter that has been thrown into contention in recent times as the House of Lords has explained the foundation of the action in terms that have raised controversy<sup>68</sup>. It is suggested that two matters traceable back to these early roots will be of importance to a South African court in considering the nature of an action *in rem* arising from the arrest of an associated ship. The first will be that as the action *in rem* has a well-established character that is known to maritime lawyers around the world it will be slow to attribute to it qualities not shared by its predecessors in the field. This gives effect to the concept of a common maritime law in seeking to give consistent meaning to a concept known and used in many other jurisdictions. Secondly the court will recognise that both the law and the procedure have their roots in the civil law on which South African law is built and in areas of difficulty it is likely to turn back to the roots of that system as they manifest themselves in modern South African law to seek a principled foundation for the resolution of issues that arise. In doing so the courts are likely to have regard to the fact that the action based on an attachment *ad fundandam et confirmandam jurisdictionem* and the action *in rem* can trace their roots back to a common source and it is probable therefore that if problems arise in characterising the novel action *in rem* flowing from the arrest of an associated ship the courts may favour solutions that harmonise the effect of the two rather than one that further separates them.

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<sup>67</sup> Browne, *op cit*, Vol 2, 507. D M Walker, *op cit*, 807, *s v* 'Maritime Law' says: '[The] procedure was based on the principles of the civil law and was more understandable by foreign merchants than was that of the common law courts.' In his famous judgment in *De Lovio v Boit* 7 Fed Cas 418 (No 3376) (C C Mass 1815) Justice Story wrote: 'The forms of its proceedings were borrowed from the civil law and the rules by which it was governed, were, as is everywhere avowed, the ancient laws, customs and usages of the seas. In fact, there can scarcely be the slightest doubt, that the admiralty of England, and the maritime courts of all the other powers of Europe, were formed upon one and the same common model; and that their jurisdiction included the same subjects as the consular courts of the Mediterranean...'

<sup>68</sup> In the case of the *Indian Grace* reported as *Indian Endurance, The (No. 2), Republic of India and another v India Steamship Company Limited* [1997] 4 All ER 380 (HL); [1998] 1 Lloyd's Rep 1 (HL).

(b) **The evolution of the action *in rem* in the English admiralty court**

Turning specifically to the action *in rem* all studies show that little is certain about the development of the action by the English admiralty court. In regard to the court itself it is said that:

‘It is impossible accurately to trace the history of the Court, for the early records relating to its origin are doubtful and obscure. The jurisdiction of the Crown concerning maritime matters seems to have been established at a very remote period, but it is difficult to ascertain to whom the exercise of this power was first entrusted, or in what manner it was originally exercised ... At what period a regular tribunal for the exercise of the duties thus cast upon the Admiral was first erected is a question much debated among antiquaries, but it is certain that in the reign of Edward III, the Court of the Admiral was firmly established, and in the succeeding reign it was sufficiently powerful to assert prominent jurisdiction.’<sup>69</sup>

The development of the admiralty law in England did not progress smoothly. From an early stage the admiralty court became mired in conflict with the common lawyers and the common law courts commencing in 1389 with a statute of Richard II entitled ‘An act concerning what things the Admiral and his deputy shall meddle’!<sup>70</sup> From then on the history is one which shows the admiralty court under fairly consistent attack, with intervals of truce, from the common lawyers who interpreted the statutes setting the limits of the admiralty jurisdiction in a restrictive manner so as to limit that jurisdiction and issued writs of prohibition to prevent the admiralty court from exercising jurisdiction in virtually every situation where a matter could be dealt with

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<sup>69</sup> Williams & Bruce, *op cit*, 2-3. Edward III died in 1377 and the first volume of Marsden’s *Select Pleas of the Court of Admiralty* is for the years 1390-1404. Marsden says that the origins of the Court can be traced with reasonable certainty to the period between 1340 and 1357. Marsden, *Select Pleas of the Court of Admiralty*, Selden Society, Vol 6, (1892), xiv. See also Benedict, *op cit*, chap. II. Roscoe, *op cit*, 1-2 takes a more positive view of matters and suggests that: ‘The early history of the tribunal which at last became a recognised national Court under the name of the High Court of Admiralty is now clear through recent researches and publications ...’ However this appears to be somewhat optimistic especially as the research appears to be solely that of Marsden. Marsden (*Introduction* I) and the editors of *Hale and Fleetwood*, *op cit*, xxix, fn 5 quote Stubbs as saying that ‘the history of the jurisdiction ... is as yet obscure’.

<sup>70</sup> 13 Rich 2 st1 c5. The conflict may have arisen earlier. Wiswall, *op cit* 1, cites an instance in 1296 of the court of common pleas denying the authority of the Admiral to adjudicate disputes involving seizure at sea. The case is also referred to in *Moore’s Federal Practice*, 3<sup>rd</sup> Ed, Vol 29, § 701.01[2][c]. This would however date the origins of the court to a period earlier than that suggested by Marsden.

by the common law courts. The triumph of the common law courts might have been complete and the Court of Admiralty could have disappeared had there not been technical procedural difficulties that precluded the common law courts from exercising jurisdiction in certain maritime matters. Williams and Bruce summarise the position as follows:

‘Had the system of common law procedure been more elastic than it was, doubtless it would have been made to embrace the whole jurisdiction of the Admiralty, and one great anomaly in our law would thus have been removed. But the technical process of the Courts of common law limited their jurisdiction, and hampered their procedure; and it was impossible with any show of justice, to prohibit suitors from resorting to the Admiralty in cases where that Court alone could afford a satisfactory remedy. So that, as matters at last adjusted themselves, the admiralty judges, although compelled to abandon all claim to general maritime jurisdiction, were yet suffered to exercise undisputed authority in all maritime cases where the common law could not give redress.’<sup>71</sup>

The action *in rem* is the product of this troubled time for the English admiralty court. When it was first used in something approximating its present form and what its original nature was are unclear but an examination of the historical record suggests that there was a process of evolution during which the original forms of civil process became constricted and restrained until by the early part of the 19th Century only the action commenced by the arrest of the vessel and its equipment remained and came to be treated as a unique form of action. Before that time proceedings in admiralty were proceedings ‘civil and maritime’ capable of being commenced in various ways but slowly this was eroded and it appears that the resultant form of proceeding came to be described as an action *in rem*.

As a general proposition it is certain that arrests of person and goods, including vessels, were part of the armoury of the admiralty court from an early stage. Marsden<sup>72</sup> says that:

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<sup>71</sup> Williams and Bruce, *op cit*, 7. This passage is repeated in Roscoe, *op cit*, 8-9. See also Mears, *op cit*, 335. Wiswall, *op cit*, 1-7 says that the civilians of the Admiralty were ‘out-numbered and out-gunned’. Detailed descriptions of this conflict are also to be found in Benedict, *op cit*, chap. 3 and Ryan *op cit*, 172-193. The history of prohibition is discussed in *Hale and Fleetwood, op cit*, xlix - lviii.

<sup>72</sup> *Select Pleas in the Court of Admiralty* (Selden Society), (1892) pp lxxi-lxxii.

‘The ordinary mode of commencing the suit [in the 16<sup>th</sup> century] was by arrest, either of the person of the defendant or of his goods. Arrest of goods was quite as frequent as arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant and were within the Admiral’s jurisdiction at the time of arrest.’

Whilst arrest may have been a characteristic feature of the admiralty practice it is unclear what its purpose was and it is also doubtful whether the proceedings were of the same character as would now be regarded as an action *in rem*. In fact Marsden’s description is remarkably similar to the arrest of the debtor or the debtor’s goods that evolved in Roman-Dutch law into the attachment *ad fundandam et confirmandam jurisdictionem*. The cases cited by Marsden in the first volume of his work all appear to be cases against individuals cited either specifically or generally.<sup>73</sup> It is true that there are passages in some of the early documents that hint at the concept of an action *in rem* albeit not necessarily referred to as such. Thus in the articles of agreement signed in the Privy Council on the 18<sup>th</sup> February 1632 by the common law judges, the attorney-general and the judge of the admiralty, Article 3 provides that:

‘If suit shall be in the Court of Admiralty for building, amending, saving or necessary victualling of a ship, *against the ship itself, and not against any party by name, but such as for his interest makes himself a party*, no prohibition is to be granted, though this be done within the realm.’<sup>74</sup> (Emphasis added)

There is similar language in the Ordinance of 1648 passed during the time of the Protectorate of Oliver Cromwell, which ordained:

‘That the Court of Admiralty shall have cognisance and jurisdiction *against the ship or*

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<sup>73</sup> See for example ‘*The John of Alen*’, *op cit*, 191-2 and *Cocke v Camp*, *op cit*, 233-4.. The key portion of the warrant of arrest in the former case reads: ‘Moreover that you cite or cause to be cited peremptorily at the said ship and her tackle and goods and freight aforesaid that are now within the jurisdiction of the said Court the abovenamed John Alen in particular and in general all and singular others whomsoever having or pretending to have any right or interest in the said ship and her apparel and in the goods merchandise and freight aforesaid that each of them do appear ... at the accustomed judgment house ...’ The condemnation of the goods arrested appears to be little more than an authority to execute against them. See *Hall v Carowe*, *op cit*, 194-5. The similarity between this form of process and the attachments of person or property to establish jurisdiction permitted in certain jurisdictions in Europe is apparent.

<sup>74</sup> Benedict *op. cit*, s 44 pp 3-11 to 3-13; Williams and Bruce, *op. cit*, 10, n (k) deals with the authenticity of this resolution. Roscoe, *op cit*, 11-13.

*vessel with the tackle, apparel and furniture thereof*, in all causes which concern the repairing, victualling and furnishing provisions for the setting of such ships or vessels to sea, and in all cases of bottomry ...<sup>75</sup> (Emphasis added)

However, whilst there are a number of reported cases in the common law courts dealing with prohibitions against the Court of Admiralty, unlike other courts in England there are no reports of Admiralty decisions earlier than the time of Lord Stowell at the end of the 18<sup>th</sup> Century<sup>76</sup> and Marsden's work is referred to by Lord Esher<sup>77</sup> in the following less than flattering terms:

'I will now turn to the cases cited in Mr Marsden's book. I have looked at the original books and have come to the conclusion that they cannot be relied on; they are only equivalent to the notes taken by clerks of assizes of cases tried at assizes; and are not in any way reliable minutes of the actual decisions in the cases.'

It is difficult to trace the development of a special process or form of proceeding in a court if one does not have access to records of the cases tried in that court and the judgments in those cases, which are always the surest guide to its practice. One is at best able to identify certain features of that practice from writers on the practice and then seek to draw reasonable inferences from those features. The process is necessarily speculative to some degree.

A factor that may explain the relative paucity of material on this topic is the fact that it was uncommon for vessels to remain under arrest. As Ryan points out:

'A ship is a profit earning machine and has no value when lying idle by compulsion of process. A defendant ship owner would naturally urge upon the court some means whereby the vessel could be put underway before the wheels of justice began their grind. In addition, neither the merchants nor their growing international trade could tolerate any system that delayed goods and ships, and with them profits, after some cause of action

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<sup>75</sup> Benedict *op. cit.*, s 46 pp 3-15 to 3-16.

<sup>76</sup> H C Coote, *The New Practice of the High Court of Admiralty*, (1860), v, notes that Lord Stowell regarded the volume of work of the Court as so insignificant that he had reservations as to the desirability of publishing reports of its decisions. However it appears that he and other members of Doctors Commons kept detailed notes of cases and he regarded himself as bound by precedent. Bourguignon, *op cit.*, 243- 252.

<sup>77</sup> *R v Judge of the City of London Court and Payne* (1892) 1 QB 273 (CA); 7 Asp MLC 140 (CA) 144

had arisen. The necessity of freeing trade and navigation from burdensome litigational delay and allowing them to proceed despite legal disputes must have exerted considerable influence upon the developing admiralty procedure ... Thus it became expedient to allow the stipulation or bail to be substituted for the security provided by the ship, which was then free to go on its way. As far as the time of this procedural advance is capable of being ascertained, it is probable that it became generally available to litigants by or before 1400, as an alternative means of securing the appearance of the owners.’<sup>78</sup>

There can be little doubt that the process of allowing a stipulation or bail was a very early feature of proceedings in the Court of Admiralty. Thus when the admiralty lawyers lodged their complaints with King James I<sup>79</sup> in the *Articuli Admiralitatis* their third objection was:

‘Whereas, time out of mind, the Admiral Court hath used to take stipulations for appearance and performance of the acts and judgments of the same court it is now affirmed by the judges of the common law that the Admiral Court is no Court of Record, and therefore not able to take such stipulations: and hereupon prohibitions are granted to the utter overthrow of that jurisdiction.’

Although this complaint was rejected on the grounds that the stipulation or bail was nothing more than a recognizance, which could only be given to a court of record, it appears that the admiralty court continued to take stipulations. On the basis of the civil law it asserted that these were not recognizances but solemn civil law promises or undertakings, without consideration, but nonetheless binding and capable of being supported by sureties.<sup>80</sup> That the process of taking a stipulation from or on behalf of those interested in the arrested ship became of fundamental importance is apparent from the argument of counsel in *Delgrave v Hedges*<sup>81</sup> where in dealing

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<sup>78</sup> Ryan, *op. cit.*, 188-189. Stipulations are discussed in *Fleetwood and Hale. op cit.* lix -lxvi.

<sup>79</sup> Benedict *op. cit.*, s 43 p3-5 where the *Articuli Admiralitatis* is set out says that this was in 1611. Ryan, *op. cit* p189 footnote 94 says, in reliance on Blackstone, that it was in 1606. There is reference to the practice of taking bail or a recognizance in the Letters Patent appointing Dr Godolphin as judge of the Admiralty in 1658. See 167 ER 600-2.

<sup>80</sup> Ryan, *op cit.*, 184-185. The giving of security by way of a guarantee similar to bail in the admiralty was known to Roman Law. D 2.6 and 2.8. Browne, *op cit.*, 410 -2 and Vol 1, 357 - 362 points out that the origin of the stipulation is the special form of contract by a form of words known to the Roman Law - the contract *verbis*. See R Zimmerman, *The Law of Obligations*, 68 *et seq* on the Roman Law *stipulatio*. There is however no indication that any special form of words had to be used in giving a stipulation in Admiralty. In England, in order to evade prohibition, the stipulation was not given under seal but Browne, *op cit.*, 96-8 notes that in Ireland it was usually given under seal.

<sup>81</sup> *Delgrave v Hedges*, 2 Ld. Raym. 1285, 92 ER 343 (KB) (1707). The facts of this case illustrate some of the problems facing the researcher. The case was a claim for prohibition in which no judgment was given and an

with a prohibition he said:

‘... this was a matter of utmost consequence to the Admiralty... if a prohibition should go, that court would signify nothing, because most of their proceedings are by taking such stipulations.’

One can detect in these passages elements of what we would now call an action *in rem*. In addition there were statements from an early stage that suggested that where the ship was arrested liability extended only to the value of the vessel. Thus in *Greenway v Baker*<sup>82</sup> the following appears in the argument of counsel but not in the judgment:

‘... by the civil law ... execution ought to be only of the goods for the ship only is arrested; and the liability ought to be only against the ship and goods and not against the party.’

This theme was taken up in other cases and one begins to find references to the proceedings being *in rem*. For example Lord Kenyon said in *Menetone v Gibbons*<sup>83</sup> that the admiralty court had jurisdiction over bottomry bonds and added:

‘... indeed, it would be highly inconvenient if it were otherwise, because that court proceeds *in rem*, whereas the courts of common law can only proceed against the parties’.

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expression of view from the judge appears to have resulted in the withdrawal of the proceedings. On the facts it involved a dispute between co-owners of a vessel. Six had wished to send the vessel on a voyage and two were opposed. The majority sought and obtained from the Admiralty Court an order compelling the minority to permit the vessel to undertake the voyage against a stipulation to compensate the minority if anything happened to the vessel. When the minority’s fears proved well-founded and the vessel was lost they sued the majority on the stipulation in Admiralty. One of the majority sought a prohibition against the action, no doubt with a view to asserting the invalidity of the stipulation in a common law court. A proceeding such as this arising from disputes between co-owners in regard to the use of the ship, known as a cause of restraint (see Coote, *op cit*, 3 and form 2 at 193), is reflected in the rules of the court promulgated in 1859. Browne, *op cit*, 130-1 says that this was one of the chief controversies between owners that could come before the Court of Admiralty. It is described by N Meeson, *Admiralty Jurisdiction and Practice*, 3<sup>rd</sup> Ed, 2.39 -2.42, 30-1. Most of the cases referred to are old but the procedure is still available and occasionally used. *North Saskatchewan Riverboat Co Ltd v The ‘Edmonton Queen’* (Can F C) (1995) 96 F T R 166; *The ‘Vanessa Ann’* [1985] 1 Lloyd’s Rep 549.

<sup>82</sup> *Greenway v Baker* Godb. 259, 260 (1577), 78 ER 151. See also 3 Black Book of Admiralty 103 where it is said ‘... the ship has to pay’ although it is not clear that this has anything to do with an action *in rem*.

<sup>83</sup> *Menetone v Gibbons* 3 Term Rep. 267; 100 ER 568 (KB) (1789). This is however at a relatively late stage of development.

Baron Parke said in regard to the practice of the Court of Admiralty:

‘... that court proceeds *in rem*, and can only obtain jurisdiction by seizure and the value when seized, is the measure of liability.’<sup>84</sup>

None of this leads to any clarity concerning when precisely the action *in rem* emerged as an action specifically and solely directed against the ship or its appurtenances. Browne, who relied largely on Clerke for his description of the practice, distinguishes between an action *in rem* against the ship or its appurtenances and an action *in personam* commenced by the arrest of the person of the debtor. He adds that if the defendant did not appear, either because he could not be found or because he lives in a foreign country:

‘... here the ancient proceedings of the admiralty court provided an easy and salutary remedy, though according to Huberus, not authorised by the example of the civil law; they were analogous to the proceedings by *foreign attachment* under the charters of the cities of London and Dublin. The goods of the party were attached to compel his appearance. By this means if a foreigner owed money in England, and any ship of his came into a British harbour, or any goods of his were found in these realms, it was seizable by his creditors; and by this means the English creditor had an easy remedy for his debt, and the foreign merchant acquired more credit in England, when it was so easy to find remedy against him; for this process of attachment of goods went not only against those in the actual possession of himself, his factors, or agents, but also against those in the hands of his debtors, since the maxim of Justinian’s Code was, *debtor creditoris, est debitor creditori creditoris*. This salutary proceeding has gone into disuse in England, and great is the mischief according to commerce from the want of it. It still prevails in many parts of Europe, and gives to foreigners an evident advantage.’<sup>85</sup>

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<sup>84</sup> *Brown v Wilkinson* 15 M&W 391, 398, 153 ER 902.

<sup>85</sup> Browne, *op cit*, 434-5. The editors of *Fleetwood and Hale, op cit*, cxxxiii, question whether Clerke truly intended to say that the arrest of goods was only available when the arrest of the debtor was not possible as opposed to stressing its value in that case. This latter approach would accord with the form in which Dr Lushington subsequently reformed the rules in admiralty proceedings in 1860. Whilst Browne is correct in saying that in ancient times arrest of property other than the vessel or its equipment was permissible I think that he is in error in saying that this was a form of the action *in personam*. Historically the action *in personam* was the name given to proceedings commenced by the arrest of the person whilst proceedings commenced by the arrest of property was referred to as an action *in rem*. Wiswall, 164-6 built upon this error in suggesting that there is an admiralty arrest as a separate procedure from the action *in rem* in which the roots of the American arrest in admiralty proceedings (known as the procedure *quasi in rem*) are to be found. That theme has in turn been taken up by Professor Tetley in *Maritime Liens and Claims*, 973 - 977 and 1032-3; *International Maritime and Admiralty Law* 408-9. The confusion is illustrated by footnote 36 on p 408 of the latter work, where it is said: ‘A notable exception is South Africa, which, owing to its civilian Roman/Dutch (*sic*) law has the maritime attachment as well as arrests *in rem*’. This is confusing as the attachment *ad fundandam et confirmandam jurisdictionem* of South African law has common origins to but is otherwise very



All of this however was: ‘When the old doctrines and process of the civil law were followed, as they were when Clarke wrote his practice ...’<sup>86</sup> By the end of the 18<sup>th</sup> Century any such proceeding *in personam* would have been subject to prohibition on the grounds that the underlying contract was not one made on the high seas with the result that the appropriate admiralty process by way of an action *in personam* could no longer be invoked.<sup>87</sup> If in truth it is a proceeding *in rem* that he is describing it would have suffered the same fate, as it would have been impossible for the subject matter of the claim to have arisen on the high seas.

Accepting that Dr. Lushington is correct in saying that the last instance of an arrest *in personam* was in 1780<sup>88</sup>, then from that time all proceedings in the Court of Admiralty must have been based either upon the arrest of the vessel or upon the furnishing of a stipulation or bail to prevent such arrest or procure the release of the vessel. Whilst prior to this time no particular distinction was drawn in the Admiralty Court between proceedings which commenced by an arrest of the ship in respect of which the claim had arisen as opposed to proceedings commenced by the arrest of other property or the person of the debtor<sup>89</sup> it seems probable that once these

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different from the *saisie conservatoire* and is not confined to maritime cases but applies as a general ground of jurisdiction. The distinction is noted in Australian Law Commission Report 33, *Civil Admiralty Jurisdiction*, Chap 6, footnote 42. On *saisie conservatoire* generally see the helpful appendix in S Gee, *Commercial Injunctions*, 5<sup>th</sup> Ed (2004) 831-833.

<sup>86</sup> Browne, *op cit*, 105.

<sup>87</sup> Browne, *op cit*, 100 -107.

<sup>88</sup> *The Clara* (1855) Sw 1, 3; 166 ER 986

<sup>89</sup> As suggested by Jeune J in *The Dictator* [1892] P 304, 7 Asp MLC 251, 254. There is some support for this in the judgment of Dr Lushington in *The Volant* 1 W Rob 383; 166 ER 616 where he points out that the form of the process was that: ‘It decrees the ship to be seized, and it cites all persons having or pretending to have any right, title or interest, to appear in a cause *civil or maritime*.’ (Emphasis added) Browne, *op cit* 398 also uses this expression. The reference to ‘causes civil or maritime’ appears in the 1782 Act that deals with the jurisdiction of the Court of Admiralty in Ireland (Browne, *op cit*, Vol 2, 517) and even earlier in the Act of Union between England and Ireland, 40 George III (Browne, *op cit*, Vol 2, 518). The general reference to a maritime cause does not suggest that the subsequent distinction between the action *in rem* and that *in personam* was recognised at that time. In other words it related to the nature and subject matter of the suit rather than the procedure by which it was pursued. Mears, *op cit*, 349 fn 4 says that the pressures of prohibition resulted in all actions being commenced by arrest of goods. In *The Heinrich Bjorn* (1885) 10 PD 44 54 Fry LJ referred to proceedings being commenced in all civil law jurisdictions ‘either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel’.

other forms of commencing proceedings fell into disuse the action *in rem* came to be recognised as a special form of action in the Admiralty Court. The action *in personam* may have remained as a notional possibility but if arrests of the person or other property of the debtor had fallen into desuetude this was purely academic. Accordingly at the beginning of the 19<sup>th</sup> Century with the resurgence of the court under Lord Stowell and, after him, Dr. Lushington the action *in rem* assumed a form broadly familiar to modern lawyers although this appears to have been an evolutionary process rather than something that occurred at a precise point in time.

When Browne wrote in 1802 he refers to ‘Proceedings in *Rem*’ as proceedings against ‘the ship or cargo’. This was at a time when the concept of a maritime lien had not yet been mentioned in any judgment and before it came to influence views on the nature of the action *in rem*<sup>90</sup>. An examination of the statements by writers and in some of the cases indicates that the language used in characterising proceedings as being *in rem* or *in personam* was derived from the Roman Law concepts of a real and a personal action. However this is confusing because the proceedings in Admiralty were of a different character from these Roman Law precursors.<sup>91</sup>

In the time of Lord Stowell and the early days of Dr Lushington’s term as the Admiralty judge, the position had been reached where the Admiralty Court had an accepted, albeit limited, jurisdiction in maritime cases. Its procedure was inevitably by way of the action *in rem*,

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<sup>90</sup> Browne, *op cit*, 396-7.

<sup>91</sup> In Roman Law the action *in rem* was an action to recover a specific thing that had to be specified. D 6.1.6. W W Buckland, *A Textbook of Roman Law*, (3rd Ed), 607 says that: ‘If what he complained of was that a right *in rem* which he claimed to have was disputed, to his injury, he would ordinarily bring an *actio in rem*, a *vindicatio*, the generic name of all actions to enforce such rights.’ The action was accordingly vindicatory and was the means of enforcing proprietary rights of property. Buckland, *op cit*, 181. J M Kelly, *Roman Litigation*, 12 notes that : ‘Before the days of the *actio ad exhibendum* the plaintiff in an *actio in rem* had equally to use his own force in order to secure the presence *in iure* of a disputed movable object. An action *in personam* was any other form of action against a particular debtor. The editors of *Fleetwood and Hale*, *op cit*, xxxix say that: ‘The historical relationship between the Admiralty action *in rem* and the Roman *actio in rem* may, however, be more apparent than real, and more apparent in the eighteenth and nineteenth centuries than it was in earlier centuries.’ In my view the Roman law terminology was adopted as convenient without concern for historic accuracy. The ease with which someone coming from a different legal system can confuse unfamiliar terminology with something familiar is illustrated by M P Schlichting, *The Arrest of Ships in German and South African Law*, (1991) who in chapter III treats of the arrest of

commenced by the arrest of the ship and usually followed by the giving of bail. Its procedures continued to follow the models of the civil law. Having reached that stage of acceptance and avoided writs of prohibition for some years the time came for the tide to turn. Dr Lushington, who was also a member of parliament campaigned for an extension of the Admiralty Court's jurisdiction and this was initially realised by way of the enactment of the Admiralty Court Act, 1840<sup>92</sup>, although it came at the price of having to give up his seat in Parliament in return for a higher salary. Claims arising in respect of mortgages; questions of title to or ownership in a ship or its proceeds arising in a cause for possession, salvage, damage, wages or bottomry and claims against foreign ships in respect of salvage, towage and the supply of necessities were added to the list of permissible claims and Dr Lushington made good use of this to establish a growing reputation for the court. Twenty years later whilst he was still the Admiralty judge the jurisdiction was further extended by way of the Admiralty Court Act, 1861<sup>93</sup>. This added claims for the building, equipping and repair of ships; claims for necessities; cargo claims in respect of cargo carried into England and Wales; claims for damage done by a ship; ownership and related questions; wages and disbursements and an extension of the existing jurisdiction in respect of salvage and mortgages.

Section 35 of the 1861 Act provided that the jurisdiction in the High Court of Admiralty could be exercised either by proceedings *in rem* or by proceedings *in personam* and the new rules promulgated under the 1861 Act provided for both forms of action. The reform of the rules of the court<sup>94</sup> by Dr Lushington in 1860 embodied the notion of proceedings *in rem* commenced by the arrest of goods or the vessel and proceedings *in personam* commenced by the arrest of the person of the debtor. However, as pointed out by Scott LJ in *The Beldis*, by that time lawyers in admiralty laboured under the misapprehension that a maritime lien had to underlie any action *in*

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ships in Germany as if this is equivalent to the action *in rem* and in Chapter XI with the arrest of persons as if this is equivalent to the action *in personam*.

<sup>92</sup> 3 & 4 Vict. C. 65. The relevant text is conveniently set out in Shaw, *op cit*, 141-144 and Hofmeyr, *op cit*, 325-327.

<sup>93</sup> 24 Vict. c. 10. Again the text is set out in Shaw, *op cit*, 145-150 and Hofmeyr, *op cit*, 325-333.

*rem* and this view was inconsistent with the commencement of proceedings by the arrest of general property of the debtor. In practice, because of the advantage of security that it offered, the primary procedure remained by way of the action *in rem*<sup>95</sup>. In other words action would be commenced by the arrest of the vessel and this would either result in the sale of the ship and the creation of a fund in court or would be followed by the furnishing of bail or security to ensure that any judgment could be satisfied.

This then was the jurisdiction and procedure that South Africa acquired under its admiralty jurisdiction and which it still exercised in 1983. It provided for pre-action arrest and the obtaining of security for the claim. Its jurisdiction was not confined to actions arising in the jurisdiction and was available to *peregrini*. However the range of claims within the jurisdiction was subject to curious restrictions such as the requirement that cargo claims could only be brought in relation to cargo carried into a South African port. The sister ship arrest was not available to a claimant. The procedures of the Court were outmoded and the law often obscure. The jurisdiction sat uncomfortably alongside the parochial jurisdiction. Like the latter it required reform and this was forthcoming. However from this synopsis of each system some common ground seems to emerge.

### 3. Do the action *in rem* and the attachment *ad fundandam et confirmandam jurisdictionem* share common origins?

Viewed from the perspective of a Roman Dutch lawyer the description of the purpose and function of the action *in rem* in its older form as derived from Clerke's *Praxis*<sup>96</sup> and endorsed in

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<sup>94</sup> A reform that Coote, *op cit*, vi, says was necessary in view of the defective state of the Court's procedures.

<sup>95</sup> An advantage recognised by Coote, *op cit*, 131-2 when he says that: '... no prudent person will hesitate to proceed *in rem* if the *res* be within the jurisdiction of the Court, so a personal proceeding is never adopted unless the *res* be inaccessible to arrest.'

<sup>96</sup> Clerke's *Praxis Curiae Admiraltatis Angliae* a work written by an admiralty proctor in the period of the Restoration and first published in 1667, with a second edition in 1743 and a number of editions thereafter.

*The Dictator*<sup>97</sup> bears a substantial resemblance to the arrest of either person or property to found jurisdiction that was a feature of the procedural jurisprudence of a number of places in Europe in the early days of the Admiralty Court in England.<sup>98</sup> Just as the Roman Dutch jurists held that arrests were designed to induce the party arrested, particularly a foreigner, to give security and submit to the jurisdiction of the local court<sup>99</sup> so Dr William Scott (later Lord Stowell) argued that in instance proceedings the Admiralty Court ‘... proceeds originally by arrest, in order to compel bail to be given to submit to the jurisdiction.’<sup>100</sup> More recently the editors of *Hale and Fleetwood on Admiralty Jurisdiction*<sup>101</sup> have located the origins of the action *in rem* in the procedure known as the *processus contra contumacem*, discovered in article 20 of the *Ordo Judiciorum*, a description of civil procedure by an Italian civilian.<sup>102</sup> That procedure is based on the notion that if the defendant fails to appear before the court and give security in response to an arrest of his goods he is in a state of contumacy and the goods may in due course be condemned to the claimant. An opportunity is furnished to the debtor to defend the case and secure the release of the arrested goods by putting up security (usually in the form of a personal surety which is in substance the same as bail in the Admiralty Court in England) failing which the goods arrested

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<sup>97</sup> Footnote 89, *ante*.

<sup>98</sup> Halsbury, *op. cit* para. 305, fn 1; *The Banco* [1971] 1 All ER 524 (CA) 531; *The Monica S* [1967] 3 All ER 740 (QBD) 745-6. Shaw, *op cit*, 27 mentions the resemblance.

<sup>99</sup> See footnote 6, *ante*.

<sup>100</sup> *Smart v Wolff* 3 Term Rep 323 330; 100 ER 600

<sup>101</sup> *Op cit*, xxxviii-xxlvii. Their view has received enthusiastic endorsement from Professor W Tetley, ‘*Arrest, Attachment and Related Maritime Law Procedures*’ (1999) 73 Tulane L R 1895 although it is debatable whether he is correct in saying in his subsequent book *International Maritime and Admiralty Law* (2002) 404, that their research supports the view that ‘jurisdiction in the Admiralty Court was exercised in one or both of two modes: *in personam* and/or *in rem*’. Whilst it is described in *Fleetwood and Hale, op cit*, xxxix as being ‘a process available in the middle ages not only in the *actio in rem* but also in the *actio in personam*’ I believe that this is importing into the earlier procedure a distinction that was not then recognised and is a later creation of English admiralty proceedings. In my view there was a single form of action that could be commenced either by arrest of the person or by arrest of property and these two became distinct in England because of the peculiar problems that the Admiralty Court experienced in that country. In European jurisdictions that in any event applied the civil law such problems could not have arisen.

would be adjudged to the creditor and sold in satisfaction of the claim. This is closely parallel to the procedure described by Clerke and Browne.<sup>103</sup> It is also fundamentally the same procedure as is described by Voet<sup>104</sup> and Huber<sup>105</sup> as applying in Holland and Frisia.

There seems to be little reason to doubt that a procedure similar to the one described above and based on either the arrest of the debtor or the arrest of his property was in widespread use throughout Europe in matters of trade, including maritime cases, from the 14<sup>th</sup> Century. That these procedures were known in England can also not be doubted. Two further examples from other jurisdictions will suffice. The first is taken from *The Judicial Order of the Courts of the Consuls of the Sea*<sup>106</sup>, which describes the procedures in the Courts of the Consuls of Valencia. These were annexed to *Il Consolato del Mare* because similar regulations were promulgated in respect of other courts in other parts of the dominions of the Kings of Aragon.<sup>107</sup> The opening portion of Chapter XXX reads as follows:

‘If it should be demanded by the Plaintiff by parole or in writing, that the defendant should give security to meet the judgment on his claim, otherwise that proceedings should be taken against him, if the defendant is a stranger, he must forthwith give security, otherwise he ought to be seized and set in the common prison and stay there until the claim is settled.’

There is an obvious similarity between this and the process of arrest that manifested itself elsewhere in Europe.

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<sup>102</sup> 1 *Black Book of the Admiralty* 178 - 220. Sir Travers Twiss suggests in his introduction to this volume (at xxxiv) that this may be connected to the law school at Bologna and could be linked to a treatise on procedure by Bartolus. See also page 178, fn 2 and 220, fn 2.

<sup>103</sup> The procedure is summarised in Mears *op cit* 343-8. It is also similar to the procedures used in the courts established under the ancient charter of the City of London. See *John Strype's Surveys of the Cities of London and Westminster, Book 5 Chap 28 sv 'attachment'* available at [www.hrionline.ac.uk/strype](http://www.hrionline.ac.uk/strype) ..

<sup>104</sup> Voet, Book II, Titles 4, 5, 6, 8 and 1.1

<sup>105</sup> Huber, Book V, Chaps 1-3.

<sup>106</sup> 4 *Black Book of the Admiralty* 450 - 495.

The second example is taken from the *Consuetudo vel Lex Mercatoria* published in 1685 by Gerard Malynes, a merchant, which displays an extensive knowledge of the law and practice in many parts of Europe at this time and earlier. He writes on the manner of proceedings in sea-faring cases that:

‘If the defendant do stand out, or commit a contempt by not appearing to defend himself or Ship, or things challenged; the Judges of the Admiralty may (after four defaults entered) deliver the possession of the said Ship, or any other thing, or part thereof to the Plaintiff, putting in Sureties for one year and a day; and if the party appear not within that time, then the property is finally adjudged to the Plaintiff. ... Summons and Citation are not needful, where the Ship or goods in question are forthcoming, but may be done in the same places where it lieth, or goods are found. If any man be arrested or troubled for the like matters, he is presently to be discharged upon Sureties, and especially Mariners, because they shall not be hindered of their voyage. Which he may do with so much goods, or the value thereof, as he hath on Shipboard, at the Judges discretion: Because otherwise Traffick and Commerce is hindered.’<sup>108</sup>

Again the process being described is one in which security for the claim has to be put up and may have its source in arrest of person or goods the release of which can be procured by the provision of security. The parallels between these descriptions of very similar processes are a clear indication that the relevant procedures in different countries were essentially similar and existed,

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<sup>107</sup> Twiss in 4 *Black Book of the Admiralty* 451, fn 1.

<sup>108</sup> G Malynes, *Consuetudo vel Lex Mercatoria*, Part 1, Chapter XVIII, 88. See also Part 3, Chapter XI, 290 where he comments that the common law of England does not use the course of attachments, although it is part of the custom of the Court of the City of London and ‘was borrowed from Merchants Actions observed in Foreign Countries’. Malynes refers in this to cases in Amsterdam and other parts of the Netherlands which suggests that he was familiar with the procedure of founding jurisdiction by the attachment of the person or property of the debtor. In Chapter 5 of Welwood’s *Collection of Sea Laws*, which was published together with Malyne’s work in 1686 (and from which he is said to have copied substantially) there is a description of the manner of proceeding in sea-faring cases. It reads: ‘The Judge may order his Marshall or Officer by his sentence called *primum decretum* to put the Plaintiff in possession thereof, at least to the worth of the Suit. Providing notwithstanding that if the Party compeire within a year and a day after offering the expense made to the Pursuer and Caution to obey the Definitive, he shall yet be heard upon the propriety. Otherwise, that time having fully expired, the Judge may proceed and adjudge the Propriety of the Ship to the Plaintiff.

Neither is it needful to execute Summons or Citations in such case, elsewhere but where the Ship or quarrelled Goods in question lies, or at the Port usual of their haunting.’

The reference to finding a caution was still in use in Scotland in 1896. *Green’s Encyclopaedia of Scots Law*, Vol 1, sv ‘*High Court of Admiralty*’.

with the support of the merchants, for the convenient conduct of commerce.

This similarity is to be expected bearing in mind the common civilian roots of maritime jurisprudence and procedure on both sides of the English Channel and the likelihood that English merchants would demand that their judges should be as protective of their interests as those in Europe were of the interests of their citizens.<sup>109</sup> One should also not overlook the fact that from the Norman Conquest in 1066 until the loss of Calais in 1558 there were English pretensions to rule France and to a variable extent some suzerainty over parts of France throughout this period. Similarities in legal processes in relation to disputes between merchants trading across the Channel would be inevitable in those circumstances.<sup>110</sup> It seems improbable that the only importation into England would be law French.

An appropriate description of the arrest *ad fundandam et confirmandam jurisdictionem* would be that it is a procedure commenced by the arrest of the person or property of the debtor for the purpose of compelling the debtor to appear and defend the claim whilst affording security to the creditor. It can hardly be entirely coincidental that those are the very features of the action *in rem* mentioned by writers such as Clerke and Browne and identified by the cases in England that have adopted the procedural theory of the action *in rem*. As both systems sought to apply the civil law, both as a matter of substantive law and as a matter of procedure, it is not surprising to find as a general proposition that the courts on both sides of the English Channel used similar

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<sup>109</sup> Precisely this concern is mentioned by Dr. Lushington in *The Volant* 1 W Rob 383, 166 ER 616

<sup>110</sup> From 1066 until 1204 most of the Norman barons who accompanied William the Conqueror had estates on both sides of the Channel. Normandy was annexed to England in 1106 but it was lost again a few years later. Henry II (1154-1189) became Count of Anjou and Maine and Duke of Normandy by inheritance and Duke of Aquitaine by his marriage to Eleanor of Aquitaine, who has historically been associated (although probably incorrectly) with the introduction of the Rôles of Oléron into England. In 1170 he added Brittany to his possessions. By 1214 Henry's son King John had lost much of France to Philip Augustus and by the Treaty of Paris in 1259 England lost everything other than Gascony (Aquitaine) and the Channel Islands. The Hundred Years War (1337-1453) was characterised by a number of English victories (Crécy, 1346; Poitiers, 1356) and an extension of English dominions in France. In 1420 Henry V was acknowledged as the heir to the French throne and Henry VI succeeded to it in 1422. However in 1453 the English were defeated in the last battle of the Hundred Years War and lost all their French possessions other than Calais. That fell in 1558. (This brief sketch is taken from various entries in the Oxford Encyclopaedia of World History.)



procedures having similar consequences for the litigants. The same analogy between procedures on the Continent and those in England was afforded by the process of foreign attachment available under the charters of the courts of the cities of London and Dublin which is referred to by both Browne and Malynes and described as an attachment *ad fundandam et confirmandam jurisdictionem*.<sup>111</sup>, without any complications arising from its being described as a proceeding *in rem*.

It seems that what are usually regarded as fundamentally different legal conceptions may well have evolved from essentially the same elements. That evolution is a product of the very different pressures that were imposed upon practice in admiralty in England as opposed to Europe. Research into the origins of these procedures shows that the difference in procedures between England and Europe in maritime matters is more a matter of domestic circumstances impacting upon the legal system rather than any difference in principle. This illustrates a point of central importance to the analysis of legal concepts in different legal systems. Where legal concepts having common origins evolve differently that is almost inevitably a result of internal pressures in the countries concerned that causes them to move in different directions or acquire different characteristics. This highlights the fact that legal systems usually evolve in response to the needs of particular societies at particular times rather than in accordance with any outward logic. This is well illustrated by the developments that took place in England and Europe in regard to the procedures available to pursue maritime claims.

The significant difference that arose between the two sides of that narrow stretch of water

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<sup>111</sup> Browne, *op cit*, 434-5 bemoans the fact that this procedure has fallen into disuse. Dr Lushington noted the parallels between the two in *The Johann Friedrich* 1 W Rob 36, 37; 166 ER 487 (1839). See also *The Bold Buccleugh*, *supra*. It seems clear that this was the same procedure as was known to the Roman Dutch law if one looks at the authorities referred to by Lord Denning MR in *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (intervening)* [1977] 3 All ER 324 (CA) 331c-332d where the procedure is described as *saisie arrêt*. See also Gee, *op cit*, 831-833. If one reads the description of the procedure given by Browne, Welwood and Malynes and compares it with the description in *The Judicial Order of the Courts of the Consuls of the Sea* or the description of procedures to be found in Voet, Huber or Van der Linden it is their similarities that strike one. There can be little doubt that all used a broadly similar form of procedure, which they derived from the Roman Law. In Europe this was the foundation for the attachment *ad fundandam et confirmandam jurisdictionem* whilst in England it underlay the action *in rem*.

was that the Court of Admiralty characterised its proceedings based on arrest of the vessel as proceedings *in rem*, whilst in Europe it was always regarded as simply an action against a person (*in personam*). The source of this difference was that in England the Court of Admiralty, applying civil law principles and procedures, was confronted with the hostility of the common law courts to its jurisdiction and procedures. On the other side of the English Channel the civil law, based on the development of the re-discovered Roman law, applied in all courts. Accordingly no reason existed outside of England on the continent of Europe for a procedure to be developed equivalent to the action *in rem*.<sup>112</sup> Nor was there any need to attach substantive law consequences to the ordinary procedure involving the arrest of the vessel, unlike the accretion of the maritime lien to the action *in rem*. Those consequences could be treated as arising from the inherent nature of a particular claim rather than from the nature of the action by which that claim was enforced. Thus in continental Europe the privileges afforded to particular claims were largely the same as those to which a maritime lien was said to attach in England, but without the procedure of an action *in rem*. Scott LJ said in *The Tolten*<sup>113</sup>:

‘The phrase ‘maritime lien’ was not the original expression in our admiralty diction. We borrowed from the French, who had in their word ‘*privilège*’ a clearer and less ambiguous name: hence their telling phrase ‘*créances privilégiées*’ to describe the secured rights of the sea creditors ... There is no difference of meaning, so far as anything in the present appeal is concerned, between the ‘*privilège*’ of Continental law and our maritime lien. And our judges in early cases used our word ‘privilege’ with the same meaning as that in which ‘maritime lien’ was subsequently used...’

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<sup>112</sup> Tetley, *International Maritime and Admiralty Law*, 406. Jessel MR in *The City of Mecca*, *supra*, 112 said that: ‘You may in England **and in most countries** proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action *in rem*, and it is perfectly well understood that the judgment is against the ship.’ (Emphasis added) However this proceeds from an incorrect assumption of the availability of the English action *in rem* on the Continent. The true position had been set out many years before by Holt CJ in *Enver v Jones* 2 Ld Raym 934; 92 ER 124 that: ‘The sentence of a civil law court in a foreign realm shall be executed in a court of the same nature here, and proceeding after the same law ... In other words courts applying the civil law in different countries recognised each other’s decisions irrespective of the precise nature of the procedure followed for the enforcement of particular claims. As the authorities cited in the court below by Phillimore J show (*The City of Mecca* 4 Asp MLC 187) this approach, which depends on the nature of the court rather than the nature of the proceedings before it, was the proper foundation of the Admiralty jurisdiction to enforce foreign judgments. Browne, *op cit*, 120-1.

<sup>113</sup> *The Tolten*, *op. cit* 149-150.

On the Continent these privileges could be enforced against the owner of the vessel without the need for an action *in rem*. The vessel would be arrested and either bail or some similar security would be furnished, or the vessel would be preserved as security to satisfy the judgment in due course, which is the origin of the modern *saisie conservatoire*. In those circumstances the privilege arises from the nature of the claim rather from the form of the proceedings whereby that claim is enforced.

By contrast with Continental jurisdictions, in England the initial procedures used in the Court of Admiralty, which had the same origin as the continental procedures, were restricted by the conflict between that court and the common law courts and the use of prohibitions. In seeking to defend their position and the existence of the court against these attacks great reliance was placed on the civil law heritage of the Court of Admiralty. Three features warrant particular mention. The first is that in relation to certain claims, such as bottomry, reference was made to the Roman law tacit hypothec and the *actio hypotheca* by which the creditor could approach the court to recover possession of the hypothecated property and sell it in execution of the claim. The second was the description of the security given in actions in the Court of Admiralty as a *stipulatio* even though there are no indications that these were given using the strict form of words required originally in Roman Law and abandoned at a later stage of development.<sup>114</sup> Third the Roman Law distinction between real and personal actions was adapted to distinguish between actions commenced by the arrest of goods (including the vessel) and actions commenced by the arrest of the person of the debtor and these came to be described as actions *in rem* and *in personam* respectively.<sup>115</sup> These features provided the elements that the American courts initially

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<sup>114</sup> Browne, *op cit*, Vol 1, 357. The importance of the *stipulatio* was that it was enforceable without consideration and hence unenforceable in the common law courts.

<sup>115</sup> In the copy of Browne kindly made available to me by Douglas Shaw QC there is a manuscript note in a different context by one of the previous owners of the book (not Mr Shaw) that: 'There is a great danger of misapprehension in confusing English and Roman law terms.' The truth of this wry observation is apparent from any study of the development of the English admiralty in which Roman Law terms were bent to use for a purpose almost wholly different from their original intent. Thus the real action of the Roman Law was vindicatory (Browne, *op cit*, Vol 1, 439) which the action *in rem* is not. On the distinction in Roman Law between actions *in rem* and actions *in personam* see B Nicholas, *An Introduction to Roman Law* (Clarendon Series)(1962), 99-108. H Staniland, *op cit*, (1996) 2 Fundamina 285.

and thereafter the English courts used to forge the concept of a maritime lien and they also underlie the debate about the nature of the action *in rem*.

It was essential for the Court of Admiralty to distinguish its practice and procedures from those of the common law courts. When it sought to proceed *in personam* it faced prohibition on the grounds that claims *in personam* had to be based on contracts concluded elsewhere than on the high seas and were therefore outside the jurisdiction of the Admiralty Court. It took refuge in the proceeding *in rem* which it was compelled to say was not an endeavour to implead any person as debtor but only the vessel. In the same way it claimed that the stipulation was not a recognizance, and, making a virtue of necessity, that the claim was restricted to the value of the *res* or the bail. These two elements became the foundation for the suggestion that the action *in rem* has a special status giving rise to what would ordinarily be regarded as substantive rights and obligations under which the claim is against the ship, is limited to its value and is divorced from the ownership of the vessel or the liability of the owners in respect of the claim. On that foundation the American courts erected the concept of the personification of the vessel. There is however no reason in principle why that approach should be taken and in general English courts have eschewed it.

All this in turn illustrates the point that different circumstances may lead to different conceptions of the nature of an action *in rem* even where the basic legal system and therefore the starting point for a consideration of the problem is the same. In the context of a new system based upon statute it is not safe to assume that all of the elements of another legal system drawn from a different time period have been taken over into South African law. That is particularly the case with the wholly new concept of an action *in rem* brought by the arrest of an associated ship. In South Africa with its unique heritage derived from both the Roman-Dutch law and English admiralty law it is possible to discern the common roots of both. That history informed the conception of the Act and it is open to our courts in considering the nature of the action *in rem* to locate it firmly within that historical context.

#### 4. **Conclusion**

From a South African perspective the action *in rem* evolved in England from civil law roots in which actions could be pursued by way of the arrest of the person or the goods of the debtor and particularly the ship. Those same roots evolved in parts of Europe into the attachment *ad fundandam et confirmandam jurisdictionem* and were imported into South Africa along with the general principles of Roman-Dutch law.<sup>116</sup> As a result of the peculiar history of internecine warfare between the common law courts and the Court of Admiralty by the latter stage of the 18<sup>th</sup> Century only the action against the vessel remained available to the Court of Admiralty and this was called an action *in rem* because it lay against a thing, or the stipulation or bail given in place of the thing, rather than against any specific person. Such an action was available in respect of a limited class of claims some of which enjoyed particular privileges giving a preference over the vessel. With the revival of the Admiralty Court at the beginning of the 19<sup>th</sup> century and the extension of its jurisdiction this special form of procedure became available in respect of a wider variety of claims. At the same time the claims enjoying a special privilege came to be characterised as maritime liens first by American and then by English courts. Whilst these were enforceable by means of the action *in rem* the two were not coterminous so far as English admiralty law was concerned. By the time the Act came into force statutory developments in England, now replicated to some extent in South Africa, had cast the action *in rem* in a fresh light.

Prior to the Act the action *in rem* in South Africa was a special form of action only available in admiralty proceedings. The action was one derived from England where it had become confined in practice to one commenced by the arrest of the vessel, usually followed by the furnishing of bail in the form of a stipulation, or in some instances merely by the furnishing of bail. The action was available in respect of a limited class of claims having a particular connection with the vessel and the maritime adventure. Some of these claims were generally

recognised in all Western maritime jurisdictions as giving rise to special privileges in relation to the vessel and in the early to middle part of the 19<sup>th</sup> century they came to be called collectively maritime liens. With the extension of the jurisdiction of the Court of Admiralty by way of the statutes of 1840 and 1861 the action *in rem* became available in respect of a far larger group of claim without those claims necessarily enjoying the status of a maritime lien.

The implications of the Act for the nature of an action *in rem* in South African law will need to be dealt with later in the particular context of the nature of such an action where it is pursued by way of an action *in rem* against an associated ship. The purpose of examining the history of the attachment *ad fundandam et confirmandam jurisdictionem* and the action *in rem* has been to see whether a fundamental underlying principle can be discerned which will cast light on the introduction of the jurisdiction to arrest an associated ship or its nature. It reveals that there is no such defining or organising principle. Instead they both evolved as practical responses to legal and extra-legal pressures. The nature of the action *in rem* in England is different from its nature in the United States of America<sup>117</sup> and there is no apparent reason why it may not evolve differently in South Africa, with its Roman Dutch heritage. There are recent indications that this may occur with our courts looking to the Roman Dutch law for a solution to a problem of jurisdiction in admiralty proceedings.<sup>118</sup>

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<sup>116</sup> In *The Heinrich Björn* (1885) 10 P 44, 53-4; 5 Asp MLC 391 (CA) 395. Fry LJ described the action *in rem* by way of the arrest of the vessel pursuant to a claim under the 1840 Act as ‘only one of several alternative proceedings *ad fundandam jurisdictionem*.’

<sup>117</sup> In the USA it is said that ‘Justice Story ... was to prove so influential in emancipating American admiralty from the restrictions of the English admiralty’. *Moore’s Federal Practice*, 3<sup>rd</sup> Ed, Vol 29, § 701.02[2], p 701.23. In the case of *The Genesee Chief v Fitzhugh*, 53 U.S. (12 How.) 443, 13 L Ed. 1058 (1851) Justice Taney extended the jurisdiction of federal courts to include navigable inland waterways, such as the Great Lakes. In this fashion, and largely as a result of judicial interpretation of the scope of admiralty jurisdiction the admiralty law of the United States is in certain respects markedly different from that of England as is its law governing. One can compare in this regard the differences between the English and American law in regard to the nature and functions of a bill of lading. M D Bools, *The Bill of Lading: A Document of Title to Goods: An Anglo-American Comparison* (LLP, 1997) especially the summary at 197-200

<sup>118</sup> *MT ‘Argun’ v Master and Crew of the MT ‘Argun’ claiming under Case No AC 126/99 and others* [2003] 4 All SA 139 (SCA) paras 31 to 33 although the link discerned by the Court between admiralty practice and the civil law ‘... if the point presently under consideration had come up for decision’ is to say the least a tenuous one. It is debatable whether the judgment of Farlam JA in this case is compatible with the decision of the Supreme Court of

Merely because no central principle can be identified as underlying the action *in rem*, this examination has not been a fruitless exercise in antiquarianism. Firstly, the common roots of the action *in rem* and attachment procedures that are embedded in our common law have been identified. Secondly it becomes apparent that the action *in rem* and the Court of Admiralty itself would not have survived had it not held out substantial advantages for the conduct of maritime litigation. That must be recognised in any future development of the action. Thirdly, the study demonstrates the inherent flexibility of the concept of the action *in rem* and its ability to be adapted to new situations. Such flexibility may be enhanced by the approach that treats the action as procedural in nature as it is always possible for courts to mould procedures to match what Holmes referred to as ‘the felt necessities of the time’<sup>119</sup>. Fourthly as a comparison of the English and American experiences shows different jurisdictions may take a different view of the nature and effects of an essentially similar form of proceeding. When South African lawyers consider the action *in rem* in the context provided by the Act and particularly in the light of the novel concept of the arrest of an associated ship they can do so without the analysis being stifled by the dead hand of history or determined by the outcome of long past conflicts between common and civil law. Whilst it is necessary to look at the history of the action *in rem* in order to identify the point from which the Act commences in providing for an action *in rem* we need to be open to the possibility, and in the case of the associated ship the certainty, that the South African legislature charted a new and different path for the action *in rem* in this country. It is submitted that the analysis of the two procedures suggests that a South African court should look at the common roots of the action *in rem* and the attachment *ad fundandam et confirmandam jurisdictionem* in

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Appeal in *MT ‘Cape Spirit’: Owners of Cargo lately laden on board the MT Cape Spirit v MT Cape Spirit and others* 1999 (4) SA 321 (SCA) where the Court held (with Farlam AJA dissenting) that an action lapsed with the lapsing under section 3 (10)(a)(ii) of the Act.

<sup>119</sup> Holmes, *The Common Law*, 1. In South Africa this is reinforced by section 173 of the Constitution which vests in the High Courts the inherent power to regulate their own procedure.

determining the effect in our law under the Act of such an action in the context of the action based upon the arrest of an associated ship.



## CHAPTER 3

### THE ACTION *IN REM* IN SOUTH AFRICA.

The action *in rem* followed the British when they occupied the Cape in September 1795 and Governor Macartney established a Vice-Admiralty Court in 1799.<sup>1</sup> This court only lasted for four years until the departure of the British in 1803 after the Treaty of Amiens, but was revived on the return of the British on a more permanent basis in 1806 during the Napoleonic Wars.<sup>2</sup> Thereafter with the Charters of Justice of 1828 and 1832 the Vice-Admiralty Court was firmly established under the new Chief Justice Sir John Wylde.<sup>3</sup> One unsuspected link between the English Admiralty Court and the Cape Colony is that in the successful battle for freedom of the press fought by Pringle, Fairbairn and Greig against Lord Charles Somerset, Dr. Lushington together with his then mentor and friend Lord Brougham intervened on the side of the colonists.<sup>4</sup> The first report of a decision in the Vice-Admiralty Court in an action *in rem* is to be found in 1842.<sup>5</sup>

In August 1845 Natal was annexed as a district of the Cape Colony and Cloete J was appointed as Recorder in the single judge court at Pietermaritzburg subject to appeals to Cape Town.<sup>6</sup> In 1856 Natal was created a Crown Colony by Royal Charter<sup>7</sup> and presumably a Vice-

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<sup>1</sup> Eric A Walker, *A History of Southern Africa*, 3 Ed. (1968) 126. The first Vice-Admiralty court had been established in Jamaica in 1662. Walker, *Oxford Companion to Law*, *op cit*, sv 'Vice-admiralty courts'.

<sup>2</sup> E Walker, *op cit*, 141.

<sup>3</sup> E Walker, *op cit*, 163.

<sup>4</sup> E Walker, *op cit*, 161. Lushington and Brougham later fell out when Brougham ensured as a condition of the passage of the Admiralty Court Act, 1840 that the holder of the office of judge of the admiralty should not be a member of Parliament. This compelled Lushington to give up his seat and occasioned him not inconsiderable financial hardship.

<sup>5</sup> *The Black Swan* (1842) 2 Menz. 350.

<sup>6</sup> E Walker, *op cit*, 222-3. Spiller *op cit*, starts his admirable history of the courts in Natal at this point but nowhere mentions the Vice-Admiralty courts.

Admiralty Court was established in name at least at this stage. In 1863 when the Vice-Admiralty Courts Act<sup>8</sup> was passed both the Cape Colony and Natal were listed in the schedule to the Act as colonies possessing such courts. The jurisdiction appears to have been invoked from time to time albeit only occasionally.<sup>9</sup> It must be remembered that many maritime claims, such as cargo claims and collisions in South African waters, would have had an essentially 'domestic' flavour and provenance and could have been pursued satisfactorily in the ordinary courts on the basis of at most an attachment to found jurisdiction. Thus there would generally speaking have been little need to invoke the unfamiliar and slightly esoteric jurisdiction in admiralty.

The Vice-Admiralty Courts were replaced by Colonial Courts of Admiralty by way of the Colonial Courts of Admiralty Act 1890<sup>10</sup> which provided in section 2 thereof that:

'(1) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a small court of Admiralty, or which, if no such declaration is in force in the possession, has their own original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act, mentioned and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty ...

(2)The jurisdiction of a Colonial Court of Admiralty shall be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.'

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<sup>7</sup> E Walker, *op cit*, 269.

<sup>8</sup> Vice-Admiralty Courts Act 1863 (26 Vict. C24).

<sup>9</sup> The only case reported in Natal is that of *In re The Ship Myvanwy* (1883) 4 NLR 43. Whilst *Smith v Davis*, *op cit*, was not an Admiralty case, because the Plaintiff wished to take advantage of the more favourable Roman Dutch rule in regard to the apportionment of liability in collision cases, De Villiers CJ made the point that it could have been pursued in the Vice-Admiralty Court. The only reports of actions brought in that court in the Cape Colony prior to 1890 appear to be those of the *Black Swan*, *supra*; *Irvine & Co. v 'Elise'* (1877) 7 Buch. 148 and *Thomson, Watson & Co v Wieting and others (The Formica)* (1883) 2 SC 197.

No pre-union South African court was ever declared to be a Colonial Court of Admiralty but all four of the colonies which in 1910 became the Union of South Africa were British possessions and the High and Supreme Courts of those colonies accordingly qualified as Colonial Courts of Admiralty although in the case of the Transvaal and the Orange River Colony this was academic. Even in the coastal colonies there is, however, little evidence in the reported cases of the jurisdiction under this Act being invoked before Union in 1910.

The creation of the Union of South Africa did not affect the operation of the Colonial Courts of Admiralty Act in South Africa and the several divisions of the Supreme Court of South Africa became Colonial Courts of Admiralty upon their creation. The legal history was summarised in the following way by Botha JA in *Trivett & Co (Pty) Limited v Wm. Brandt's Sons & Co Limited*<sup>11</sup>:

'It is clear that the four British Colonies which in 1910 became the Union of South Africa in terms of sec. 4 of the South Africa Act ... were British possessions within the meaning of that expression in sec. 2(1) of the Colonial Court of Admiralty Act, 1890, and that every court of law which in those colonies had unlimited civil jurisdiction, became, in terms of that section, a Colonial Court of Admiralty with the jurisdiction conferred by the 1890 Act.

The Union of South Africa was clearly also a British possession within the meaning of that expression in sec. 2(1) of the 1890 Act and it is, therefore, also clear that the several Divisions of the Supreme Court of the Union of South Africa also became Colonial Courts of Admiralty in terms of the said sec. 2(1), for they were Courts of law which had unlimited civil jurisdiction in a British possession.

The jurisdiction exercised by them as Courts of Admiralty in the Union of South Africa being prescribed by the Act of 1890, that Act accordingly applied in the Union. It was accordingly not necessary to provide for its continuation in the Union of South Africa by sec. 135 of the South Africa Act, 1909, and it probably never was the intention to do so. Sec. 135 was concerned more with the continuation of existing Colonial laws in the respective Provinces of the Union, and not with the 1890 Act which, by reason of the definition of British possession, was applicable to the whole of the Union as a single British possession.

The application in the Union of South Africa of the Colonial Courts of Admiralty Act 1890, was recognised by sec. 6 of the Statute of Westminster, 1931 (22 Geo. 5 C5), as read with sec. 3 of the Status of the Union Act, 69 of 1934, and by the proviso to sec. 106

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<sup>10</sup> Colonial Courts of Admiralty Act, 1890 (53 & 54 Vic. C27).

<sup>11</sup> 1975 (3) SA 423 (A) 432H-433C.

of the South Africa Act, 1909, and ... immediately prior to the commencement of the Republic of South Africa Constitution Act 32 of 1961, the 1890 Act was in force in the Union of South Africa.'

The existence of the admiralty jurisdiction did not carry with it any great volume of work and very little substantive decision-making in Admiralty matters is to be found in the law reports. Certainly there was no consideration of the nature and effect of the action *in rem* and most of the reported cases deal either with procedural matters or with whether particular claims fell within the jurisdiction<sup>12</sup> or with issues arising from the arrest of vessels such as the maintenance of the crew.<sup>13</sup>

If the course of the argument in *The Owners, Master and Crew of the SS 'Humber' v The Owners and Master of the SS 'Answald'*<sup>14</sup> is any guide there appears to have been little understanding of the nature and scope of the admiralty jurisdiction. That was a collision case which the plaintiffs sought to pursue in the Supreme Court by way of an attachment *ad fundandam et confirmandam jurisdictionem* of the SS 'Answald'. The parochial jurisdiction was invoked and the case failed on the basis that both parties were *peregrini* and the collision had occurred outside South African territorial waters. An endeavour to rescue the situation on appeal by equating these proceedings with an admiralty action *in rem* failed. The case is interesting for present purposes because it is clear that the claim could have been pursued by way of an action *in rem* before the same court sitting as a Colonial Court of Admiralty. The fact that it was not - as is

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<sup>12</sup> See for example *The 'SS Keratos' v The 'SS Fabian'* 1921 CPD 148; *Ex parte Lampert & Holt Limited : In re mv Edouard Giroud* 1933 CPD 138; *Foss Launch & Tug Company v SV Commodore* 1943 NPD 27. The arcane nature of the jurisdiction is illustrated by the fact that Searle J thought it appropriate to write and have reported a judgment on the straightforward issue of when a writ in an action *in rem* and a warrant of arrest could be issued. *Ex parte Government of the United States of America : In re SS Union Carrier* 1950 (1) SA 880 (C). In the Cape the practice grew up of applying to court for the issue of a warrant of arrest notwithstanding that this was unnecessary in terms of the Admiralty Rules. See *Foss Launch & Tug Company v SV Commodore*, *supra*.

<sup>13</sup> See for example *In re The 'Gwydyr Castle'* (1920) 41 NLR 231; *The Assouan* (1921) 42 NLR 33; *The Eros* (1922) 43 NLR 137.

<sup>14</sup> 1912 AD 546.

perfectly clear from reading the judgments in the court *a quo*<sup>15</sup> - is at least some indication that the bringing of maritime proceedings before the court sitting in the exercise of its admiralty jurisdiction was not an everyday occurrence at the time. Had it been, it is difficult to conceive that a substantial case of this nature would not have been brought before the court in the exercise of that jurisdiction.

In the result, until 1961 there were only four reported cases that dealt with substantive matters of maritime law in the context of an admiralty action *in rem* before a court sitting as a Colonial Court of Admiralty. Two that came from Natal were those of *In re SS Mangoro*<sup>16</sup> and *Crooks & Co v Agricultural Co-Operative Union Limited*<sup>17</sup> both of which dealt with questions of priorities in the distribution of a fund arising from the sale of a vessel by the court acting in the exercise of its admiralty jurisdiction. One case from the Cape dealt with sovereign immunity.<sup>18</sup> The last one from the Eastern Cape dealt with a collision in Port Elizabeth harbour<sup>19</sup> but other than a passing statement that the action was one *in rem* it has no other trace of an admiralty provenance.

In 1961 South Africa became a Republic but there is little indication that this awakened the admiralty jurisdiction from its relatively somnolent state. A far more important date is 1967 when the Suez Canal was closed following upon the Six Day War between Israel and Egypt. Prior to that date, as Friedman J explained<sup>20</sup> the position was that:

‘[M]ost ships calling at our ports carried full insurance, consisting of hull insurance,

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<sup>15</sup> *In re SS ‘Humber’ v SS ‘Answald’* 1912 NPD 208.

<sup>16</sup> (1913) 34 NLR 67.

<sup>17</sup> 1922 AD 423. The judgment *a quo* is reported as *In re SS ‘Beaver’* (1921) 42 NLR 216.

<sup>18</sup> *De Howorth v SS India: Mann George & Co. (Delagoa) Limited v The SS India* 1921 CPD 451.

<sup>19</sup> *South African Railways and Harbours v Lyle Shipping Company Limited* 1958 (3) SA 419 (A). The judgment does not deal with any substantive issue of maritime law but with the effect of an exemption clause in a towage contract.

<sup>20</sup> DB Friedman ‘*Maritime Law in Practice and in the Courts*’ 1985 SALJ 45 46.

which covered the ship against most forms of physical damage, and the cover provided by their membership of the so-called P&I (i.e. Protection and Indemnity) clubs. The latter, in effect, provided the ship and its owner with whatever liability cover was not provided under the hull policy. Such cover included 25% of damage caused by collision with fixed and floating objects (the remaining 75% being covered by the hull policy), wreck removal and oil pollution liability, liability for death of and injury to crew, and perhaps most significantly, liability in respect of cargo claims. I say 'most significantly', since by far the greater part of maritime claims in practice concerns, in one way or another, loss of or damage to cargo. Nearly all, if not all, of this insurance was placed in London, and all the P&I clubs were controlled and administered in England. On the other side of the coin, the insurance cover effected by cargo, was likewise effected with insurers based in England.

In other words, most shipping claims arising in South Africa concerned English insurers and, in particular cargo claims, were, in essence, claims by an English underwriter against a P&I club. Consequently most shipping claims were dealt with in London, usually on a 'knock for knock' basis and often by means of arbitration before English arbitration tribunals. The role of the South African lawyer in relation to such claims was confined, by and large, to that of investigating claims with the assistance of marine surveyors and insurance assessors and reporting to his instructing solicitors in London. Other than this, his work consisted of participating at maritime enquiries into collisions; and occasional litigation against the South Africa Railways and Harbours arising out of the alleged negligence of those in control of tugs, in relation to collision claims, and of crane operators and stevedores, in relation to cargo claims.'

Other factors were also relevant. The mass of shipping litigation to which we are now accustomed was less present at that time even in a centre of maritime litigation such as London.<sup>21</sup> Generally speaking before 1967 levels of litigation internationally were relatively low if compared with the current position. Virtually everywhere in the world there has been an explosion of litigation since that time reflected in the enormous pressures placed on courts throughout the world, congestion of court rolls and, in most countries, a very substantial increase in the number of members of the judiciary. Whilst it is correct therefore that the level of maritime litigation in South Africa was relatively low prior to 1967 that was part of a wider phenomenon.

This increased litigiousness was accompanied in the period from the end of the Second World War to the mid to late 1970's by a period of profound change in world shipping. At its commencement major shipping lines based in a small group of Western countries conducted most

of the world's shipping trade. During this period that oligopoly was broken. Changes that commenced prior to the Second World War escalated after the war. Entrepreneurs took advantage of post-war conditions and seized the opportunity of increasing trade, such as the expanding trade in oil and the consequent development of fleets of tankers for the transport of oil. In the process the face of international shipping changed radically.

This change in the shipping industry was reflected in a substantial change in the manner in which ship owners conducted their affairs. There were considerable shifts in patterns of ship registration from the traditional position where vessels were registered in the state of their owners and flew the flag of that state, to the use of flags of convenience, where the link between the vessel's owners and the state in which it is registered is minimal or non-existent. Although there are earlier historical examples, for modern purposes the use of flags of convenience starts with the creation of the first open ships' registry, that is one which permitted non-citizens to own and control vessels carrying its flag. Legislation enabling this to happen was enacted in Panama in 1925 under pressure from American shipowners seeking to avoid the impact of Prohibition and also to reduce operating costs by employing cheaper labour<sup>22</sup>. Ready<sup>23</sup> describes the growth of flags of convenience in the 1930's as follows:

'During the same period the United Fruit Company's fleet of banana vessels was transferred from the United States flag to that of Honduras.

The worsening political situation in Europe in the 1930s provided considerable impetus to the flags of convenience. In 1935, the 25 vessels forming the Esso Baltic fleet were transferred from the flag of the Free City of Danzig to that of Panama. During the Spanish Civil War a number of Spanish vessels made use of the Panamanian flag and many Greek owners re-flagged their ships in Panama to avoid the non-intervention blockade imposed by Great Britain and other powers. High crewing costs under the Greek flag in the pre-war years also led to growing use of the Panamanian flag by Greek operators. In 1932, Manuel Kulukundis registered the *Mount Athos* under Panamanian flag; this was followed

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<sup>21</sup> Wiswall, *op cit*, 148 notes that in 1946 according to figures furnished to him by the Admiralty Registrar there were only 100 cases brought before the Admiralty Court in England and this had grown to 350 in 1966. Even allowing for arbitrations that is not a vast body of litigation, but it does indicate the beginning of the trend to more litigation.

<sup>22</sup> M Stopford, *Maritime Economics* (2<sup>nd</sup> Ed), 434 - 440.

<sup>23</sup> N P Ready in R Coles, *Ship Registration: Law and Practice* (4<sup>th</sup> Ed), 18-19. B A Boczek, *Flags of Convenience*, (1962), 9 - 12

by a number of vessels in the Onassis fleet.

Following the outbreak of war between the European powers in 1939, the Panamanian flag saw a further influx of United States tonnage seeking to avoid the provisions of the United States Neutrality Act preventing the carriage in American ships of cargoes destined for belligerents on either side. The transfers to the Panamanian flag were in many cases made with the connivance of the United States Government which saw to the arming of American-owned Panamanian flag vessels and the extension of war risk cover to such vessels. There seems also to have been some Axis use of the Panama flag during the hostilities....'

Notwithstanding these developments the principal growth in the use of flags of convenience as a major component of world shipping occurred only after the Second World War. In 1949 Liberia was established as a flag of convenience registry operating through a Liberian Trust Company with offices in New York and Zurich<sup>24</sup> and Costa Rica followed soon afterwards.<sup>25</sup> In 1952 there were 4 million gross registered tons under Panlibhonco flags. By 1954 this had grown to 6 million gross registered tons and by 1956 to 11 million tons. In 1967 Liberia surpassed the United Kingdom as the largest ships' registry in the world.<sup>26</sup> By 2000 Liberia and Panama accounted for 7741 ships and more than 165 million gross register tons, which was over a quarter of all world tonnage<sup>27</sup>. Figures suggest that more than half the world's shipping is now registered under flags of convenience with a number of smaller countries using an open registry as a means of attracting foreign exchange and foreign business.<sup>28</sup>

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<sup>24</sup> Boczek, *op cit*, 12. Details can be found on <http://www.offshore-manual.com/taxhavens/liberia/html>. The impetus to establish this registry came from America. Cole, *op cit* paras 2.18, 19. Stopford, *op cit*, 434 points out that after the United States government sold off Liberty Ships to American owners in terms of the Merchant Sales Act, 1946 some 150 ships were registered in Panama to take advantage of the liberal registration and tax benefits available with that registration.

<sup>25</sup> The expression Panlibhonco is used as a collective description of the Panamanian, Liberian, Honduran and Costa Rican flags of convenience. According to Boczek, *op cit*, 14 the Costa Rican registry commenced in 1949 and peaked in 1958 after which it declined.

<sup>26</sup> <http://www.crwflags.com/fotw/flags/flagcov.html>.

<sup>27</sup> Cole, *op cit*, 19. In the three years between the second and third editions of this book the number of vessels registered in these two countries had increased by more than 600 and the tonnage by 32 million gross registered tons. Stopford, *op cit*, 436 - 437, identified the principal registries as those of Liberia, Panama, Cyprus, Bahamas, Malta, Bermuda and Vanuatu. Boczek, *op cit*, 16-25 has a number of tables showing the growth in flag of convenience registrations from 1954 to 1961.

<sup>28</sup> The International Transport Workers' Federation, which has long conducted a campaign against the use of flags of convenience, in 1997 had designated Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, Burma,



The rights and wrongs of this change in the pattern of worldwide ship ownership are not relevant for present purposes.<sup>29</sup> Three effects that are relevant to the associated ship jurisdiction should however be noted. Firstly ship ownership became more diverse and international and ceased to be confined to a relatively small group of shipowners predominantly located in Western Europe and North America. Secondly, the fragmentation of ship ownership by placing each vessel in a separate ship-owning company was relatively inexpensive and held out tax and other financial advantages to shipowners, particularly the powerful benefits of anonymity, separate corporate personality and limited liability. Thirdly, whilst not necessarily a universal truth applicable to all shipowners who made use of flag of convenience registrations and certainly one that has diminished as such use has become more widespread<sup>30</sup>, there are grounds for thinking that, in the initial phases of this development, standards of seaworthiness and safety and the quality and qualifications of crew were generally lower and the level of regulatory supervision considerably less with the flags of convenience vessels. This was inevitably something that would lead to an upsurge of claims in respect of such vessels.<sup>31</sup>

The upsurge in marine traffic around the coast of South Africa after 1967 occurred against this background. A greater number of ships, some of debatable seaworthiness, passed our shores

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Cambodia, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Honduras, Lebanon, Liberia, Malta, Marshall Islands, Mauritius, Netherlands Antilles, Panama, St Vincent and the Grenadines, Sri Lanka, Tuvalu and Vanuatu as flag of convenience registries.

<sup>29</sup> Cole, *op cit*, 19-25. The subject is considered in depth in Boczek, *op cit*, 26-90.

<sup>30</sup> Cole, *op cit*, 20-21. Stopford, *op cit*, says (at 438): 'Although open registries developed a mixed reputation in the 1980s, the commercial pressures to 'flag out' have continued and many large shipping corporations eventually and often reluctantly, abandoned their national flag in favour of open registries. In some cases the national flag responded by setting up its own open register. Thus, in the 1990s open registers have, for the main part fallen in line with regulatory practice and this form of ship ownership has become accepted practice.'

<sup>31</sup> Cole, *op cit*, 20 notes that casualty records of open registry vessels reveal a considerably higher rate of losses than in the traditional maritime countries and sets out the reasons identified by UNCTAD for vessels on these registries having lower safety standards. It is no surprise to find that one of the leading websites dealing with flag of convenience vessels is entitled <http://www.stoptherustbuckets.info/engels/flaghtm> Cole, *op cit*, 20-23 further says that this is a criticism that is increasingly regarded as unjustified. It is undoubtedly true however that at the time the Act was under development there was a widespread view amongst maritime lawyers in South Africa that there were many 'rustbuckets' amongst the vessels passing through South African waters.

and called at our ports.<sup>32</sup> This increase in traffic in conjunction with a more litigious environment led increasingly to litigants seeking resort to South African courts. In view of the jurisdictional limitations of the parochial courts, which limited access to South African plaintiffs and foreigners where the litigation had some South African connection, lawyers turned to the admiralty jurisdiction and the action *in rem* as a means of pursuing claims on behalf of foreign clients. The awakening of the somnolent admiralty jurisdiction prompted the riposte that since South Africa had become a Republic in 1961 and was no longer a British possession the status of South African courts as Colonial Courts of Admiralty had fallen away completely<sup>33</sup>. That contention was, however, rejected when first raised<sup>34</sup> and in due course was laid to rest by the Appellate Division,<sup>35</sup> which held that the Colonial Courts of Admiralty Act had been specifically preserved by the statute under which the Republic of South Africa was constituted.<sup>36</sup>

Free from any threat to its existence the admiralty jurisdiction flourished as the rapidly expanding list of cases published in the law reports demonstrates.<sup>37</sup> Of course many more cases

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<sup>32</sup> Friedman J, *op cit*, 46 described the position in the following terms: 'After the closure of the Suez Canal, as most of you probably recall, the volume of traffic to South African ports increased enormously. This traffic included ships which had previously been employed carrying cargo from port to port along the Mediterranean and through the Canal to the Persian Gulf area. Many of them were not fit to undertake the more lengthy voyage around the Cape, were owned or managed by undercapitalised companies, and were not always fully insured. A consequence of this was that the South African ship-repair industry boomed when these ships were forced to call at South African ports for essential repairs; but the repair bill was not always met, and thus started a series of attachments and delays to the ship which, because of the owner's parlous financial state, led to large-scale legal work locally.'

<sup>33</sup> Republic of South Africa Constitution Act 32 of 1961. In the Second Reading debate on the Bill that became the Admiralty Jurisdiction Regulation Act, 5 of 1972 the question was raised whether there was any point in the Act in view of the possibility that the effect of South Africa becoming a republic had been to abolish the jurisdiction of the courts sitting as colonial courts of admiralty. Hansard, Vol 37, columns 450 - 452 and 543.

<sup>34</sup> *Tharros Shipping Corporation SA v Owner of the Ship 'Golden Ocean'* 1972 (4) SA316 (N) 319F-321A

<sup>35</sup> *Trivett & Co (Pty) Limited v Wm Brandt's Sons & Co. Limited* 1975 (3) SA 423 (A) dismissing an appeal from the judgment in *Wm Brandt's Sons & Co. Limited v The 'Waikiwi Pioneer' and others* 1974 (4) SA 351 (N).

<sup>36</sup> The relevant provision was section 107 which read as follows: 'Subject to the provisions of this Act, all laws which were in force in any part of the Union of South Africa or in any territory in respect of which Parliament is competent to legislate, immediately prior to the commencement of this Act, shall continue in force until repealed or amended by the competent authority.'

<sup>37</sup> *Peca Enterprises (Pty) Limited and another v Registrar of Supreme Court, Natal N.O. and others, supra; Ex parte The Crew, m.v. 'Caracas Bay'* 1977 (4) SA 945 (C); *Beaver Marine Limited v Wuest* 1978 (4) SA 263 (A); *Owners*

were dealt with without attracting the attention of the law reporters. At the same time there was a corresponding increase in maritime cases heard by the courts in the exercise of their ordinary jurisdiction. South African insurers were moving into the market previously dominated by English insurers and preferred litigation in this country to foreign litigation or arbitration. The opening of the Richards Bay harbour for the handling of various commodities in bulk saw the entry into the market of Far Eastern shipping interests and international commodity traders<sup>38</sup>, whose involvement was connected with attempts by the then South African government to avoid the effects of international sanctions against this country.<sup>39</sup> The effect was to increase the volume of maritime legal work in South Africa.

As it became apparent that the lawyers and courts in South Africa were capable of handling this increased body of litigation there were increasing endeavours by foreign claimants to invoke the jurisdiction of South African courts. This was facilitated by the expedient of foreign claimants ceding their claims to South African companies, usually companies controlled by South African attorneys and established for the very purpose of taking cession of, pursuing and accounting for the proceeds of such claims.<sup>40</sup> The usual reason for ceding a claim rather than proceeding in admiralty was that the claim fell outside the limited list of claims in respect of which the Colonial Court of Admiralty enjoyed jurisdiction under the 1840 and 1860 Acts. The

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*and/or Master of the m.v. 'Matoria' and others v Omnipex Overseas SA* 1979 (3) SA 616 (C); *Kandagasabapathy and others v m.v. Melina Tsiris* 1981 (3) SA 950 (N); *Agencia Nacional de Freite E Navegaco v The m.v. 'Enrique de Asquinado'* 1981 (2) PH M52 (N); *Magat and others v m.v. Houda Pearl* 1982 (2) SA 37 (N); *Intercontinental Export Company (Pty) Ltd v m.v. Dien Danielsen* 1982 (3) SA 534 (N); *Quick & Louw & Moore (Pty) Ltd and another v SS Almoural and others* 1982 (3) SA 406 (C); *Owner of m.v. 'Aegean Sun' v Caisse Generale de Perequation Aif de Prix BP* 1982 (4) SA 625 (C); *Magat and others v m.v. Houda Pearl* 1983 (3) SA 421 (N); *Alahaji Mai Deribe & Sons v The Ship 'Golden Togo'* 1986 (1) SA 505 (N).

<sup>38</sup> Friedman, *op cit*, 47.

<sup>39</sup> It is no co-incidence that the first major litigation under the Act, once it came into force, arose from the collapse of the Eddie Hsu shipping line, which consisted of relatively modern bulk carriers, at least four of which were arrested and sold by order of South African courts. The Marc Rich organisation based in Switzerland was a frequent litigant in South African courts in cases involving commodity trading - especially coal.

<sup>40</sup> *Bird v Lawclaims (Pty) Limited*, 1976 (4) SA 726 (D); *Hare v Banimar Shipping Co SA* 1978 (4) SA 578 (C). The practice was halted by the decision in *Skjelbreds Rederi A/S and others v Hartless (Pty) Limited* 1982 (2) SA 710 (A) but that decision was soon overtaken by the Act coming into force thereby doing away with the need to resort to such expedients.

fact that resort was had to such a device illustrates the pressure to broaden the scope of South African Courts' jurisdiction in respect of maritime claims.

This massive increase in maritime litigation in South Africa served to highlight the anomalies attendant upon its dual jurisdiction and the outdated nature of its maritime law and procedure. The need for reform became pressing. That reform came with the passing of the Act in 1983 and with it the introduction of the jurisdiction based upon an associated ship arrest. How that came about and the factors that influenced that development is the subject of the next chapter.

## CHAPTER 4

### THE ROAD TO THE ASSOCIATED SHIP.

#### 1 THE PROCESS OF REFORM :

The increasing volume of marine traffic around South Africa and the concomitant growth in maritime litigation in the latter part of the 1960's highlighted the difficulties inherent in South Africa's dual maritime jurisdiction.<sup>1</sup> As Durban and Richards Bay are the busiest ports in South Africa the bulk of maritime litigation took place in Natal and there was constant jockeying for advantage between the two jurisdictions, as litigants sought either to take advantage of, or avoid, the decision in *The SS 'Mangoro'*.<sup>2</sup> It was impermissible for the court sitting as a Colonial Court of Admiralty to take account of international developments in maritime law during the previous seventy-five years.<sup>3</sup> With a jurisprudence ossified at 1890 the relevant legal materials for admiralty proceedings were relatively inaccessible.

The parochial jurisdiction remained parochial in character and was as a result inaccessible (and incomprehensible) to many potential litigants. The Roman Dutch law, like the English admiralty law at 1890, had not developed in the light of international developments, save for the incorporation of certain provisions governing limitation and the Hague Rules in the Merchant

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<sup>1</sup> Mr D J Shaw QC, ultimately the principal author of the Act, described the position in the following terms in a report to the AGM of the Maritime Law Association on the 29th September 1978: '... the law itself is not only antiquated [but] difficult to find and contradictory between the two main maritime provinces'. He went on to say: 'If one could get the law straight then I think that one has made a great advance because the law, as everyone knows in the Cape we have the English law, in Natal we have the last outpost of the Roman-Dutch law in the Admiralty field and in neither case is the law readily available because in each case we are dealing with outmoded statutes. We are well behind in the field of any development.'

<sup>2</sup> (1913) 34 NLR 67. The jockeying was confined to Natal because in the case of conflict between the two systems the law in the Cape Province was by statute English law. However this created the absurdity that in the two principal maritime jurisdictions in South Africa the law was different so that an arrest in Cape Town might have different consequences from an arrest in Durban.

<sup>3</sup> *The Yuri Maru and Woron* [1927] AC 906 (PC); *Tharros Shipping Corporation SA v Owner of the Ship 'Golden Ocean'* 1972 (4) SA 316 (N).

Shipping Act.<sup>4</sup> The relevant legal material in the form of writings by Roman Dutch writers and the various ordinances touching upon maritime affairs to be found in the Groot Placaat Boek<sup>5</sup> was neither readily available nor, bearing in mind that it was written in either Latin or High Dutch and much of it had not been translated into either English or Afrikaans, accessible or comprehensible to the majority of practitioners, much less potential litigants. Helpful though that material may be in exploring the history of the development of maritime law it was not sufficient to constitute a coherent body of legal principle appropriate to the determination of maritime disputes in a Twentieth Century environment of international trade. Not surprisingly pressure for reform mounted and one of the purposes of establishing the Maritime Law Association in 1974 was to lobby for reform<sup>6</sup>.

The first attempt to reform South African maritime law occurred with the passage of the Admiralty Jurisdiction Regulation Act 5 of 1972. However, this was a misconceived attempt because it did not seek to address the real difficulties relating to jurisdiction, procedures and the applicable law. Claire Dillon described it thus:

‘A half-hearted attempt at reform was made ... when the Admiralty Jurisdiction Regulation Act 5 of 1972 was passed. The Act was doomed to failure as it did not attempt to amend comprehensively the jurisdiction and law of admiralty courts in South Africa ... It repeals the Colonial Courts of Admiralty Act of 1890 insofar as it applies in South Africa and vests the ‘powers and jurisdiction’ of admiralty courts in the provincial and local divisions of the Supreme Court. The admiralty jurisdiction of the various divisions is seemingly still to be that of the English Admiralty Court as in 1890, an assumption confirmed by the fact that the jurisdiction was transferred to those divisions ‘notwithstanding the repeal’ of the 1890 Act. No provision is made for the law to be applied in the Supreme Court when exercising its admiralty jurisdiction, but presumably ‘powers and jurisdiction’ will include the substantive admiralty law of England as fixed at

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<sup>4</sup> Merchant Shipping Act 57 of 1951, ss 261-263 (limitation) and ss 307-310 (Hague Rules).

<sup>5</sup> Assuming those to have been incorporated into South African law. *R v Harrison and Dryburgh* 1922 AD 320. In *Euromarine International of Mauren v The Ship Berg* 1984 (4) SA 647 (N) 665C Leon J correctly described the Roman Dutch law as applied in maritime cases as ‘largely fragmentary and relatively undeveloped as a modern system of mercantile law’.

<sup>6</sup> At the inaugural meeting of the MLA on the 21<sup>st</sup> February 1974 it was agreed at the outset that one of its aims would be: ‘To promote legislation for the elimination of the archaic aspects of the shipping laws of the Republic and the introduction of laws conforming to modern practice throughout the world and to consolidate all such laws.’

1890. The overlapping jurisdiction of the Supreme Court, when exercising its ordinary jurisdiction and when exercising its admiralty jurisdiction, is not removed. The Act therefore merely vests outdated admiralty jurisdiction in all the divisions of the Supreme Court and makes no serious attempt at reform.<sup>7</sup>

Fortunately the shortcomings of this Act were recognised relatively rapidly and it was never brought into operation.

The broader review that was clearly necessary commenced in 1977 when the South African Law Commission was requested to undertake a review of the law of admiralty<sup>8</sup> after the Maritime Law Association of South Africa had made representations to the Department of Justice. On the 15<sup>th</sup> September 1982 the Law Commission published its Report<sup>9</sup> together with a draft Bill. After

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<sup>7</sup> C Dillon and J.P. van Niekerk, *South African Maritime Law and Marine Insurance : Selected Topics*, 21. See also H Booysen, 'Admiraliteitshowe in the Suid-Afrikaanse Reg', 1973 THRHR 241 256-259. He concluded that the only intelligible construction to put upon the Act was that it preserved two separate courts. At a meeting of the executive of the MLA on the 15<sup>th</sup> November 1974 it was decided: '... that as a prerequisite to establishing rules regulating procedures in Admiralty in the Republic it was essential to bring about an amendment of the Admiralty Jurisdiction Regulation Act No 5 of 1972 to define precisely the jurisdiction of the Admiralty Courts in South Africa.' A two person committee was established to undertake the task of motivating amendments to the Act, defining the proposed jurisdiction and preparing rules. The committee reported on the 15<sup>th</sup> April 1977. In the Report of the President of the MLA of the same date it was recorded that the committee's report would be sent by the Department of Justice to the Law Commission for consideration

<sup>8</sup> For that purpose Mr. D.J. Shaw QC was appointed as an additional member of the Commission and paragraph 9 of its report reflects his role in the following terms: 'Mr. D.J. Shaw QC was appointed an ad hoc member of the Commission for the purpose of this project because of his specialised knowledge of the subject. He has done most of the research on behalf of the Commission. He has also drafted the proposed legislation. Mr. Shaw has indeed rendered invaluable services to the Commission through all stages of the investigation.' It appears that the MLA may have suggested that this appointment be made as the Report of its President in April 1977 records that: 'The Minister has requested that the Commission give the matter priority and if necessary, engage the services of persons other than members of the Commission so as to ensure that the amendments to the Act are introduced to Parliament during the next session.' Mr Shaw was appointed in December 1977. It was reported at the executive committee meeting on the 29<sup>th</sup> September 1978 that pursuant to the developments in regard to the 1972 Act Mr Shaw had been appointed. On the following day Mr Shaw reported on progress thus far to the AGM of the MLA. It became apparent at that stage that there would not simply be a revision of the 1972 Act but an attempt to produce 'a statute which will comprehensively deal with the rules and procedures relating to the Admiralty Law', something which he recognised would be a 'very large task'.

<sup>9</sup> South African Law Commission, Report on the Review of the Law of Admiralty, project 32 (1982). In addition to the Report I have had access to Mr. Shaw's initial draft of the Act, prepared at the end of 1979, and an accompanying explanatory memorandum furnished by him to the Law Commission ('the 1979 memorandum'); a revised draft and somewhat fuller explanatory memorandum ('the 1980 memorandum') prepared in October 1980; proposed amendments to the Act dated the 9<sup>th</sup> December 1980 arising from discussions at a meeting of the Law Commission on the 1<sup>st</sup> December 1980 and a general meeting of the MLA; a further draft dated October 1981 and two further drafts in 1983 after the publication of the Report. the 1979 and 1980 memoranda and the accompanying draft bills

some further debate and re-drafting the Admiralty Jurisdiction Regulation Act 105 of 1983 was passed and came into operation on the 1<sup>st</sup> November 1983.<sup>10</sup>

From the outset it is apparent that the process of reform would involve an amalgam of the existing jurisdiction and procedures of both the Colonial Courts of Admiralty and the Supreme Court in combination with an adaptation of the old terminology from English admiralty proceedings to the new regime. In the 1979 memorandum the following is said about the action *in rem*:

‘Among the most important procedural matters is the preservation and extension of the present procedure *in rem* which exists in the Courts of Admiralty in the Republic which sit by virtue of the Colonial Courts of Admiralty Act. Experience shows that the procedure *in rem* is the most and frequently the only effective method of enforcing admiralty claims. It has greatly increased in importance certainly in the United States of America and, I believe in the United Kingdom with the reduction, in some cases almost to the point of disappearance, of companies carrying on a regular, that is liner, service. In the present situation the most frequent need in the Admiralty Court is to provide a remedy against the owner of a vessel which is the only asset of the company which owns it. Common law proceedings by way of attachment to found jurisdiction are frequently ineffectual to enforce the claimant’s rights because many jurisdictions do not recognise a judgment founded on attachment. In those circumstances it seems to me to be essential to preserve and to bring up to date the provisions relating to proceedings *in rem*.’

The accompanying draft Bill also provided for an action *in personam*. Whatever may be said about the continued existence of an action *in personam* in admiralty it is clear that the action *in personam* in the draft came from the ordinary form of action in the Supreme Court, as the High

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are contained in appendices 1 and 2. The initial draft Bill and the 1979 memorandum were circulated to the Judges President of the proposed Maritime Divisions, individual judges and practitioners and the Maritime Law Association. The 1980 second draft and 1980 memorandum were similarly circulated in October 1980 as were the proposed amendments arising from the December 1980 meetings, which were circulated in February 1981. See paragraphs 8.2 to 8.4 of the Report. I have also had access to the minutes of the MLA which reflect the history and contain several reports by Mr Shaw to the members of the MLA concerning progress on the Bill.

<sup>10</sup> Even the title of the Act was a late change introduced by the very last draft in which both the short and long title were amended. In all earlier drafts including the draft annexed to the Law Commission Report the Bill’s short title was either the Admiralty Courts Jurisdiction Act or the Admiralty Courts Act. Notwithstanding what appeared in the various drafts of the Bill the MLA minutes persistently refer to it as the Admiralty Jurisdiction Regulation Act and perhaps this influenced the final title. The other possibility is that it had become apparent that the scope of the Bill was limited to courts and their admiralty jurisdiction and was thus of more limited scope than had initially been intended.



Court was then known. With an *incola* defendant an action *in personam* would be available on relatively conventional grounds. With a *peregrinus* the proposed action *in personam* was essentially the common law action based upon the attachment *ad fundandam et confirmandam jurisdictionem* as appears from the following passage from the 1979 memorandum:

‘5(b)(ii) In actions *in personam* I have thought it desirable to preserve the rules with regard to attachments to found jurisdiction but to do away with the necessity that the Plaintiff should be an *incola*, a requirement which has produced the practice of ceding claims to companies set up for the purpose only of receiving cession and enforcing claims chiefly maritime claims.<sup>11</sup> As the *peregrinus* may be required to give security for costs it does not seem to me that any hardship is involved. As attachment *in personam* is itself a feature originally of admiralty actions and as I understand it still prevails in the United States I can see no need for doing away with this requirement.’

Outwardly the ambit of these reforms did not appear to be extensive. The action *in rem* taken from English admiralty proceedings was retained but applied to a greater range of claims and extended by the availability of sister ship arrests. Whilst a considerably more extensive jurisdiction than that enjoyed by the courts sitting as Colonial Courts of Admiralty it went little further than any regime established in England or Europe as a result of the Arrest Convention. The proposed action *in personam* was drawn directly from the Roman Dutch law and had no immediate equivalent in English law. Its scope was broader inasmuch as the remedy was now available to everyone, both *incolae* and *peregrini*. The effect of removing the restrictions that had previously existed in the case of *peregrini*, namely that the cause of action required some connection with South Africa in order for jurisdiction to be established by way of attachment, substantially extended the potential availability of this procedure as a means of founding jurisdiction in South Africa. However, as the procedure *in rem* was to be available to the same class of claimants in respect of the same class of maritime claims this departure from the traditional restrictions that South African law imposed in an action in which jurisdiction was founded by way of an attachment of property of the debtor, was unlikely to have a significant effect.

The proposals departed from the English position and other common law jurisdictions that applied English admiralty law because in those countries an action *in personam* supported by an attachment of property was not feasible. It also departed from the position in Europe, where the action *in rem* did not exist. Its closest parallel was with the admiralty and maritime jurisdiction in the United States of America.<sup>12</sup> In the exercise of its admiralty and maritime jurisdiction<sup>13</sup> the action *in rem* had become part of American admiralty law. However in an early judgment<sup>14</sup> the concept of the maritime lien emerged (or was endorsed) and the action *in rem* was held to be linked inextricably to the existence of a maritime lien. The result was that in the USA the action *in rem* diverged from its English roots. This distinction is apparent from Supplemental Rule C(1)

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<sup>11</sup> This was written at a time when the validity of such cessions had been upheld by lower courts and before the judgment of the Appellate Division in *Skjelbreds Rederi A/S and others v Hartless (Pty) Limited* 1982 (2) SA 710 (A).

<sup>12</sup> A full description of the practice in admiralty and maritime matters is set out in *Moore's Federal Practice*, 3<sup>rd</sup> Ed, Vol 29 particularly chapter 702. Supplemental Rule B deals with *in personam* actions and Supplemental Rule C with *in rem* actions.

<sup>13</sup> This jurisdiction is recognised under the Constitution of the United States of America and was the subject of early statutory regulation by way of An Act to regulate Processes in the Courts of the United States, Act of September 29, 1789, 1 Stat, Ch. 21 and an Act for Regulating the Processes in the Courts of the United States and Providing Compensations for the Offices of the said Courts and for Jurors and Witnesses, Act of May 8, 1792 Stat, 1 Ch. 36, both of which provided that the admiralty and maritime jurisdiction would be in accordance with civil law and the principles, rules and usages of courts of admiralty. From an early stage and under the influence of Justice Story that jurisdiction was taken to be extensive. His seminal judgment in *De Lovio v Boit* 7 Fed Cas 418 (No 3376)(C C Mass 1815) involved a reconsideration of English admiralty jurisdiction and a rejection of the approach by the English common law courts. Story concluded: 'In all the great maritime nations of Europe, the terms 'admiralty jurisdiction' are uniformly applied to the courts exercising jurisdiction over maritime contracts and concerns. We shall find the terms just as familiarly known among the jurists of Scotland, France, Holland and Spain, as well as England, and applied to their own courts, possessing substantially the same jurisdiction as the English admiralty in the reign of Edward the Third.' His conclusion was that: 'The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold that it had reference to that maritime jurisdiction which commercial convenience, public policy and national rights have contributed to establish, with slight local differences, over all Europe; that jurisdiction which under the name of consular courts, first established itself upon the shore of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the welfare of mankind...' NJ Healy and DJ Sharpe, *Admiralty: Cases and Materials* (2<sup>nd</sup> Ed, 1986) 13 say that Justice Story had written the judgment in advance as an essay on the proper scope of American admiralty jurisdiction and simply awaited an opportunity to deliver it. The subject matter of the decision was whether a claim based on marine insurance fell within the admiralty jurisdiction. The answer was in the affirmative.

<sup>14</sup> *The Nestor* 18 Fed Cas 9 (No 10126)(C C Me 1831); 1 Sumner 73. It is unclear whether the term was coined in that judgment or was taken from an early edition of *Abbott on Shipping*.

which provides that an action *in rem* may be brought to enforce a maritime lien or whenever a statute of the United States provides for a maritime action *in rem* or a proceeding analogous thereto. Not surprisingly in a jurisdiction where the availability of the action *in rem* is so heavily dependent upon the existence of a maritime lien, ‘The scope of maritime liens is broader under United States law than in almost any other jurisdiction.’<sup>15</sup>

The United States has also retained the admiralty action *in personam*. Where there is jurisdiction over the person of the defendant in such an action either on the basis of valid service upon the defendant or where it has sufficient ‘minimum contacts’ with the local forum there is no need for an attachment of property.<sup>16</sup> Where, however, jurisdiction cannot be established on that basis but the defendant has property within the jurisdiction of the court an action *in personam* can be founded upon the maritime attachment of that property.<sup>17</sup> This procedure is said by some writers on American admiralty proceedings to give rise to ‘quasi-*in rem* jurisdiction’.<sup>18</sup> In adopting this description they regard the American courts as preserving an ancient procedure by way of an admiralty attachment.<sup>19</sup>

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<sup>15</sup> *Moore’s Federal Practice*, 3<sup>rd</sup> Ed, Vol 29, § 705.01[1], p 705.8. A summary of the liens recognised in the United States appears in § 705.02[2]. There are important statutory extensions of the classes of liens under the Federal Maritime Liens Act 46 U.S.C. §§ 31341-31343 and by way of the extension of the maritime lien to include preferred mortgages under 46 U.S.C. § 31322.

<sup>16</sup> Tetley, *International Maritime and Admiralty Law*, 426.

<sup>17</sup> Under Supplemental Rule B of the Federal Rules of Civil Procedure. *Moore’s Federal Practice*, 3<sup>rd</sup> Ed, Vol 29, § 702.02[2][a], p 702-8;

<sup>18</sup> *Moore’s Federal Practice*, 3<sup>rd</sup> Ed, Vol 29, § 705.04; Wiswall, *op cit*, 165; Tetley, *International Maritime and Admiralty Law*, 408-409. To a South African lawyer there seems to be a considerable resemblance between this procedure and the action *in personam* commenced by an attachment *ad fundandam et confirmandam jurisdictionem* under the Act. There are however differences at least of concept if not of effect in that in the United States it is said that in this form of proceeding jurisdiction is established by service - not the attachment - and the attachment merely serves to provide a fund from which any judgment can be paid. *Moore, supra*, 705.04 *sed contra* 706.02[10][a][iii], p 706-35.

<sup>19</sup> Browne, *op cit* 434-5; Wiswall, *op cit*, 17. Wiswall draws a distinction between what he terms admiralty arrest and foreign attachment on the basis that the former involves the seizure of property in the possession of the defendant, whilst the latter is said to involve a seizure of a defendant’s property while in the possession of a third party. It is unclear on what material he bases that distinction. However there is no doubt that he is correct in saying that American courts have always asserted as part of their admiralty jurisdiction a right to arrest property in support of an action *in personam*. *Munro v Almeida* 10 Wheat (23 US) 473, 490 (1825); *Miller v United States* 11 Wall (78 US)

The passing reference in Mr Shaw's 1979 memorandum to a practice that 'I understand ... still prevails in the United States' does not justify a conclusion that it was intended to model the proposed procedures in South Africa upon those applicable in the United States of America. In any event they are by no means identical. Unlike the United States the South African proposal for an action *in rem* was not based upon the existence of a maritime lien. In addition it followed the Arrest Convention in allowing for the arrest of a sister ship, whereas in the United States sister ship arrest is not available.<sup>20</sup> That necessarily follows from the American approach that the action *in rem* must be based upon a maritime lien. South Africa was eventually to go beyond the sister ship arrest in permitting the arrest of an associated ship. The similarities are far more between the procedure for the commencement of an action *in personam* by way of an attachment *ad fundandam et confirmandam jurisdictionem* and the American procedure of establishing jurisdiction in an action *in personam* by way of the attachment of property under Supplemental Rule B where the defendant is not available within the court's area of jurisdiction.<sup>21</sup>

Overall therefore the proposal was not an imitation of any jurisdiction existing anywhere else in the world. The proposed Act sought to merge the two broad streams of jurisdiction and procedure in maritime matters already existing in South Africa. These were to be incorporated in a unified system of admiralty jurisdiction with the one being conveniently described as the action *in rem* and the other as the action *in personam*. The range of claims to which they were both

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268 (1870). The position was summarised in a modern judgment in the following terms: '[T]he use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty ... has prevailed during a period extending so far back as the authentic history of those tribunals can be traced'. *Aurora Maritime Co v Abdullah Mohamed Faheer & Co* 85 F 3d 44, 47 (2d Cir 1996)

<sup>20</sup> Tetley, *International Maritime and Admiralty Law*, 408.

<sup>21</sup> The most important differences between the procedure under Supplementary Rule B and an action *in personam* in South Africa are the following. Firstly they lead to different forms of action with differing consequences. Secondly the South African procedure based on attachment of property is available both in admiralty and in the ordinary courts, whilst the American procedure requires the claimant to have an *in personam* claim cognisable in admiralty. Thirdly a judgment in accordance with the South African procedure is a general judgment *in personam* against the defendant and, irrespective of whether the defendant appears in the action, the judgment can be executed against all of the defendant's property. In America it is only where the defendant appears that this is the case and in other situations the plaintiff's judgment is enforceable only against the property attached. Fourthly this form of proceeding in America does not extinguish any maritime lien but that may not be the situation in South Africa under the provisions governing the sale of the property arrested and the distribution of the proceeds in accordance with the appropriate system of priorities.

applicable was extended and existing limitations, based upon the place of origin of the claimant or the place where the claim arose, were removed. Arrests of sister ships in actions *in rem* were permitted. The net effect, even at this stage, was to propose a jurisdiction that was at least as wide, if not wider, than that then existing anywhere in the world. In seeking to catch up with the rest of the world South Africa chose to place itself firmly in the vanguard as far as the scope of its admiralty jurisdiction was concerned.<sup>22</sup>

There is no reference in either the 1979 draft or the 1979 memorandum to an associated ship. In dealing with the definitions of the phrase ‘maritime claim’ it was pointed out in the memorandum that the primary sources for these definitions were the United Kingdom Administration of Justice Act, 1956<sup>23</sup> and its progenitor the Arrest Convention. Then it is said, almost in passing that:

‘Section 6 provides for actions *in rem* and in subsections (3) to (5) incorporates the provisions as to the so-called ‘sister ship’ arrests and the limitations of the 1952 Convention to which I have referred.’<sup>24</sup>

The section in the initial draft Bill read as follows:

‘6(3) An action *in rem* may be brought by the arrest not only of the particular ship in respect of which the maritime claim arose but also against any other ship which is owned

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<sup>22</sup> I have been unable to discover in any of the South African material any of the concerns reflected in the report of the Australian Law Reform Commission (Report 33) on *Civil Admiralty Jurisdiction* over adopting too expansive a jurisdiction. In para 96 of that Report there appears the following: ‘Excessive regard to the interests of plaintiffs may carry the risk that Australia will be unattractive to foreign shipping, and that freight rates will be adversely affected. Australian admiralty jurisdiction needs to remain within generally acceptable limits, to ensure recognition of judgments and judicial sales in admiralty and to maintain the position of admiralty as an exceptional and special jurisdiction.’ If South African experience is any guide the concern seems to have been misplaced. In any event the Australian concern appears to have dissipated as in 1999 they supported the United Kingdom proposal that the Arrest Convention should be extended by revising the sister ship jurisdiction to encompass associated ships. Berlingieri, *Arrest of Ships*, 4<sup>th</sup> Ed, 583. See also S. Derrington ‘*Ship Arrest and the Admiralty Jurisdiction of Australia and South Africa: Too Far or Not Far Enough?*’ (2005) 11 *J Int Mar L* 409 and P. Glover ‘*Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: a Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*’ (2008) 22 *A & NZ Mar LJ* 99.

<sup>23</sup> 4 & 5 Eliz 2, C46.

<sup>24</sup> 1979 memorandum, para. 5(c).

by the person who was at the time when the maritime claim arose the owner of the particular ship.

(4)(a) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(b) A person having beneficial ownership of a ship or a share in a ship shall be deemed to be the owner of such ship or share notwithstanding that he is not registered as the owner.

(c) 'Owner' shall not include a charterer who has taken the ship on a charter by demise.'

An interesting feature of this is that the proposal immediately involved a small but important departure from the language of the Arrest Convention as can be seen if one compares the draft section 6 with Article 3 of the Convention which reads as follows:

'1. Subject to the provisions of paragraph 4 of this Article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship ...

2 Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.'<sup>25</sup>

The change lies in the provisions in section 6(4)(b) of the draft, which distinguish between beneficial ownership of a ship or a share in a ship and the registered ownership thereof. The source of this change is clearly section 4(4) of the Administration of Justice Act 1956, which provided:

'In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection 1 of section 1 of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action *in personam* was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court ... may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action *in rem* against:

(i) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(ii) any other ship, which at the time when the action is brought, is beneficially owned as aforesaid.'<sup>26</sup>

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<sup>25</sup> Berlingieri *op. cit.*, 324.

<sup>26</sup> Berlingieri, *op cit.*, 166 fn 15.

In this respect the draft went beyond the Arrest Convention in making it clear that registered ownership of a vessel would not be decisive in determining whether it was a sister ship in relation to another vessel.

Whilst the intention to expand the possible scope for a sister ship arrest *in rem* is clear, it is not clear whether the reference to beneficial ownership was intended to bear the same meaning in South Africa as it bore in England. In *The 'Aventicum'*<sup>27</sup> Slynn J, whilst accepting that the reference to beneficial ownership entitled the court to go behind the registered or legal ownership, appears to have contemplated something narrower than a simple identification of the ultimate beneficiary of ownership. Thus he said: 'Certainly in a case where there is a suggestion of trusteeship or a nominee holding, there is no doubt that the court can investigate it'. Similarly Robert Goff J had said in the *'I Congreso Del Partido'*<sup>28</sup> that the concept of beneficial ownership referred only to cases of equitable ownership, whether or not accompanied by legal ownership. These notions, whilst not entirely unknown in South African legal parlance,<sup>29</sup> could not be easily transplanted to this country, where the concept of beneficial ownership is more likely to involve a broad enquiry into the identity of the person or persons who enjoy the benefit of ownership.

There can be no doubt that the introduction of the concept of beneficial ownership, which conflated the provisions of the Arrest Convention and the Administration of Justice Act, 1956, was deliberate but the reasons for this are not explained in the memorandum accompanying the

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<sup>27</sup> *The Aventicum* [1978] 1 Lloyd's Rep. 184 187.

<sup>28</sup> *'I Congreso Del Partido'* [1977] 1 Lloyd's Rep 536 at 560 and 561; [1976] 3 All ER. This case is specifically referred to in the 1979 memorandum.

<sup>29</sup> Trollip JA in *Sammel v President Brand Gold Mining Company Limited* 1969 (3) SA 629 (A) 666C - 667A dealt with the concept of a nominee shareholder but queried whether it included a trustee for the transferee company. He held that a nominee shareholder in terms of the Companies Act is a person nominated by the owner of shares to hold the shares for the owner but in the name of the nominee, holding them only 'nominally'. A South African trust is not the same as an English trust and the concept of equitable ownership is unknown to our law. *Braun v Blann and Botha NN.O. and another* 1984 (2) SA 850 (A) 859E-F.

1979 draft.<sup>30</sup> The original draft was widely circulated and debated within the ranks of the Maritime Law Association. As a result the concept of an associated ship was born. The second draft of the Bill in 1980 provided in section 6(3) thereof that:

‘An action *in rem* may be brought by the arrest of an associated ship’.

This is laconically explained in the following way in the 1980 memorandum accompanying that draft Bill:

‘Clauses (3) and (4) deal not only with the sister ship arrests which are referred to in the United Kingdom Administration of Justice Act and the International Convention relating to arrest but also to what I have referred to as an associated ship. Sister ship arrests make it possible for a vessel in the same ownership to be arrested. *Since these provisions came into force there has been a tendency towards the formation of so-called ‘one-ship companies’, that is to say a company owning one-ship only. It has been suggested to me by the Secretary of the Maritime Law Association that it would be desirable to endeavour*

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<sup>30</sup> In fact both memoranda are remarkably terse in spelling out the consequences of the proposals. In the 1980 memorandum it was said that: ‘I have, therefore, drafted the Act on the basis that the action *in rem* is to be retained. I have proceeded on the basis of endeavouring to identify what are generally regarded as the proper subjects of maritime jurisdiction, have made provision for procedure, the solution of conflicts of jurisdiction in the South African courts and the priority of claims. In the remainder of this memorandum I propose to deal with the draft Act clause by clause and indicate the source of the proposals if they are derived from elsewhere or the object which I have set out to try to achieve whether or not derived from elsewhere.’ (1980 memorandum p 4). Whilst this is correct there is no hint that the changes being wrought by that process to South Africa’s admiralty law were profound and far-reaching and would give it the most extensive maritime jurisdiction in the world. Perhaps at a time when South Africa was politically extremely isolated and nearing the end of a singularly chauvinistic period in our legal history and scholarship, both academic and judicial, it was thought sensible not to stress unduly the English and international elements of the proposal and the full reach of the jurisdiction being assumed. Mr Shaw in his report to the MLA on the 29<sup>th</sup> September 1978 expressed the view that ‘... there is a possibility of getting legislation through if you put it in with sufficient unobtrusiveness ...’ Political difficulties are hinted at in paragraph 7.2 of the Law Commission’s Report and there can be few legislative changes of similar magnitude in which a Law Commission Report took a mere ten pages to identify the problem and the need for reform, one and a half pages to justify the approach to reform and only four pages to explain the reforms themselves. (The point is illustrated by a comparison with the report on the corresponding topic by the Australian Law Reform Commission, which runs to 12 chapters with appendices and hundreds of pages.) Brevity has not however proven detrimental to the quality of the product! As regards legal chauvinism Bamford, ‘Admiralty courts: A short reply’ op. cit 451 records that prior to the introduction of the 1972 Act there had been discussion in Government legal circles concerning the simple scrapping of Admiralty Courts in South Africa. (The author of that note was at the time a Senator in the South African Parliament and was perhaps sensitive to political nuances.) In the political climate at the time this may have led those who were seeking to move in the opposite direction and bring about a substantial expansion of that jurisdiction to tread warily and not proclaim their intentions too loudly.



*to deal with this situation.*<sup>31</sup> I have done so in clause (4). I appreciate that some of the phrases may seem somewhat indefinite. Clause (4)(b)(iii) has its origin in the definition of controlling company in the Companies Act. Beneficial ownership of shares is, I think, a concept which is recognised in South African law and is the phrase used in the United Kingdom Act.<sup>32</sup> (Emphasis added)

The provisions relating to associated ships in the draft Act accompanying the 1980 memorandum were as follows:

‘6(4)(a) For the purposes of subsection (3) an associated ship shall mean a ship other than the particular ship in respect of which the maritime claim arose being :

(i) A ship owned by the person who was the owner of the particular ship at the time when the maritime claim arose.

(ii) A ship owned by a company the shares in which are owned by or controlled by a person who, when the maritime claim arose, owned the shares in or controlled the company which owned the particular ship.

(b) For the purpose of paragraph (a):

(i) Ships shall be deemed to be owned by the same persons if all the shares in the ship are owned by the same persons.

(ii) A person having beneficial ownership of a ship or a share in a ship or a share in a company shall be deemed to be the owner of the ship or the share notwithstanding that he is not registered as the owner.

(iii) A person shall be deemed to control a company if he has power, directly or indirectly, to control the company.’

It will be seen from this that all of the essential elements of the ultimate associated ship arrest were embodied in these proposals. Thus a suggestion for dealing with ‘one-ship’ companies gave rise to a broad jurisdiction not expressly available anywhere else.<sup>33</sup>

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<sup>31</sup> The Secretary of the Maritime Law Association at the time was Mr. S.M.S. Dwyer who confirms that the suggestion was his. It is interesting to note that when the English delegation suggested that the concept of an associated ship should be introduced in the revision of the Arrest Convention their argument was also based on the proposition that the purposes of the Arrest Convention and the introduction of the sister ship provisions had been defeated by the proliferation of one-ship companies since 1952. Berlingieri, *op cit*, 577 and 580. See also the views of Belgium at 563 and 583; the Netherlands at 581; France and the CISL at 582.

<sup>32</sup> 1980 memorandum, pages 7-8.

<sup>33</sup> I say ‘expressly’ available because the approach of some French courts to the concept of ownership under the Arrest Convention has been to arrest vessels, which to a South African lawyer would be associated ships, on the basis of a ‘communauté d’intérêts’. Berlingieri *op cit* 168 fn 28 and paras 52.456 to 459, p170. There is no reference in the memorandum to the French approach and the cases cited by Berlingieri all post-date the Act. Whether this played any role therefore cannot now be determined. Similarly the courts in Belgium and Spain have held that

Whilst the memorandum furnished to the Law Commission and circulated to various judges and practitioners may have been terse there was certainly no illusion either on the part of Mr Shaw or on the part of members of the MLA as to the significance of this proposal. In an address to the Annual General Meeting of the MLA on the 27<sup>th</sup> 1980 Mr Shaw said:

‘I have also at the suggestion of this Association, gone rather further than the present European legislation relating to the so-called ‘sister ship arrests’. As you know the European legislation makes it possible to plead *in rem* not only against the ship which actually did the damage but against any ship owned by the same company. The net result of that of course has been the splitting of the ownership into one-ship companies and the Act provides for proceeding against what I must admit is a singularly horrible phrase ‘an associated ship’ which is a ship, the shares in the company owning which are owned by the same person as owns the shares or the ship which was actually concerned. *This is a substantial extension.* Whether it will commend itself to the powers that be, I don’t know, but I think it is a useful suggestion.’ (My emphasis.)

There is no indication in the subsequent drafts of the Bill that these provisions were viewed as being controversial. Minor changes were made to the relevant sections and their placement in the Bill changed. At a very late stage<sup>34</sup> the reference to ‘beneficial ownership of a ship or a share in a ship or a share in a company’ was removed. During the process a provision was inserted into the fourth draft that expressly provided for the arrest of more than one associated ship but it was removed in the very next draft. Otherwise from a drafting point of view the innovation of the arrest of an associated ship was introduced without either fanfare or controversy.<sup>35</sup> The matter-of-

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vessels were sister ships in terms of the Arrest Convention in circumstances that would in South Africa give rise to an associated ship arrest. Berlingieri, *op cit*, para 52.441, pp164-5 and paras 52.473 - 52.474, pp 174-5.

<sup>34</sup> The change was made only in the final draft.

<sup>35</sup> In a discussion with Mr. Shaw in January 2003 he indicated that in the deliberations of the South African Law Commission the proposal was accepted without any great philosophical analysis of its jurisprudential underpinnings and implications. It was suggested that the approach should be adopted as a matter of policy and that was accepted. This is a view shared by others who were interested in the process at the time. In a private communication to the author, Friedman J, who had by then retired from the Natal Bench, wrote: ‘I do not believe that there was any philosophical debate, nor was there any profound philosophical reason, for these provisions. They were considered to be of pragmatic value or importance, no more, no less.’ Professor Tetley makes the point that statute law is the creation of parliaments who are rarely moved by issues of legal theory or philosophy. *Maritime Liens and Claims* 36.

fact explanation for the introduction of associated ship arrests in the South African Law Commission Report was:

‘7.3 In view of the retention of the action *in rem* it is necessary, as has been done in clause 5, to set out the circumstances in which an action *in rem* may be brought. Provision has also been made for the bringing of an action *in rem* against an ‘associated ship.’ The International Convention with regard to the Arrest of Sea-going Ships, to which reference has been made above, makes provision for the arrest to found an action *in rem* of a sister ship, that is to say, a ship in the same ownership as the guilty ship. The provisions of the Bill are an extension of this notion based on the fact that since the conclusion of the Convention its provisions have been defeated by the proliferation of ‘one-ship companies’, that is to say, companies owning only one-ship and therefore avoiding the Convention. The extension is, it is thought, a logical extension of the Convention, but the broad notions upon which the Convention is founded have been preserved.’<sup>36</sup>

The last statement contains some elements of exaggeration, as the discussion in the next section will reveal, but the fact of the matter is that associated ships entered the South African legal lexicography with overwhelming support from the maritime legal community and no objection from anyone. Its origins were clearly founded in practical policy and directed at overcoming the problems that plaintiffs encountered in maritime proceedings as a result of the proliferation of single ship companies from the Second World War onwards.

## 2 THE ARREST CONVENTION

In view of the references to the Arrest Convention in the explanations for the introduction of the associated ship arrest it seems appropriate to consider the Convention to determine to what extent it can properly be regarded as the source of this innovation, or perhaps more accurately, to what extent the associated ship arrest can be regarded as a natural development of the sister ship

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<sup>36</sup> The Arrest Convention was concluded in 1952. As the discussion in Chapter 3 above demonstrates, whilst the flag of convenience registrations, which developed in parallel with the use of the one-ship company, were known prior to 1952, their use only became widespread after that date. The suggestion in Hare, *op cit* 104 that the impetus for the use of one-ship companies was the ‘Torrey Canyon’ disaster can hardly be correct. That only occurred in 1968 (not

arrest and hence preserves the foundations of that Convention. By way of background to this question it is helpful to examine the history leading up to the conclusion of that Convention and give some consideration to its terms.

The Arrest Convention was in gestation for over twenty years before it was finally adopted at the Brussels Diplomatic Conference in May 1952.<sup>37</sup> It started as an investigation by the CMI of the general topic of arrest and in particular the questions of who is entitled to arrest a ship; which ships may be arrested; where can an arrest be made and how can a ship be released from arrest?<sup>38</sup> It evolved into an endeavour to achieve a compromise between the civil law jurisdictions that recognised a procedure for pre-judgment arrest (*saisie conservatoire*) as a general remedy not confined to maritime claims, under which any property of a debtor was susceptible to arrest to secure a claim<sup>39</sup>, and the common law countries that permitted the arrest of a vessel in admiralty proceedings *in rem*, but beyond that did not recognise any similar procedure.

From 1930 until 1947 little progress was made in reconciling these differences.<sup>40</sup> The breakthrough came at the Amsterdam conference of the CMI in 1949 with the suggestion that a

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the late 1950's) by which stage the use of one-ship companies was already widespread. At most the disaster may have added impetus to an existing trend although no evidence is put forward in support of that proposition.

<sup>37</sup> Berlingieri *op cit*, 7.

<sup>38</sup> Berlingieri, *op cit*, 4.

<sup>39</sup> The common roots in the early civilian process of this procedure and the attachment *ad fundandam et confirmandam jurisdictionem* will be immediately apparent although they serve different purposes, the former being directed at obtaining security (Tetley, *Maritime Liens and Claims*, *op cit*, 962) and the latter at confirming jurisdiction in some cases and in many others at establishing an otherwise non-existent jurisdiction. According to Lord Kilbrandon speaking of the same jurisdiction in Scotland, jurisdiction established by attachment 'has always been regarded as exorbitant'. *Alexander Ward and Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424 (HL) 431 c-e. In the 1979 memorandum Mr Shaw referred to this as a reason for preserving in South Africa the English admiralty procedure by way of an action *in rem*. He wrote: 'Common law proceedings by way of attachment to found jurisdiction are frequently ineffectual to enforce the claimant's rights because many jurisdictions do not recognise a judgment founded on attachment. In the circumstances it seems to me essential to preserve and bring up to date the provisions relating to proceedings *in rem*.'

<sup>40</sup> Berlingieri *op cit* 5, footnote 37 quotes the summary of progress (or more accurately lack of progress) by Mr. Asser, one of the delegates to the 1947 CMI conference in Antwerp as follows: 'A curious thing happened in regard to that (Leopold Dor's) draft. Article 1 of the first draft provided that each creditor of the owner of a ship may arrest her. According to the report presented by Maitre Dor on that occasion, this article was intended to mean that any ship

system be adopted that limited the arrest of vessels to claims of a maritime nature but permitted the arrest of any ship in the same ownership.<sup>41</sup> This is the compromise adopted in the Arrest Convention which defines in article 1(a)-(q) seventeen claims in respect of which the arrest of a vessel may be permitted and provides in article 3.1 that:

‘...a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship...’<sup>42</sup>

Under article 3.2 ships are deemed to be in the same ownership when all the shares therein are owned by the same person or persons. The result is universally accepted as a compromise between the different arrest regimes in the two major legal systems.<sup>43</sup> The purpose of that

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might be arrested in respect of any debt of her owner whether maritime or non-maritime. In other words, this first draft reproduced what is called the Continental system of the law of arrest.

This draft met with a great deal of opposition on the part of the British delegates who stated that they were reluctant to abandon, in favour of the Continental system, the British system of a very restricted possibility of arrest. As a result of this opposition article I was redrafted several times the article was gradually amputated more and more and the text finally adopted at the Paris conference stated no more than that ‘Any creditor of an owner of a ship, by reason of collision, might operate the arrest of such ship’. Consequently, whilst the first draft had incorporated the Continental notion of the widest scope of arrest, providing for the arrest in respect of all claims, the final draft was based on the English conception of the action *in rem*, dealing mainly with collision claims, the question of arrest in respect of all other claims being left to the respective municipal laws. So what was intended to be international uniformity became merely a reproduction of the law of England. If I may be permitted to say so, this was a rather meagre result.’

<sup>41</sup> Berlingieri *op cit* 6. It is interesting that the basis of the proposal was said to be similar to the law of Scotland and the United States. In the latter jurisdiction the arrest of vessels other than that in respect of which the claim arises is not permitted because of the link between the action *in rem* and the maritime lien. In Scotland there was, as in South Africa in 1983, an entitlement to arrest in admiralty following the English law and an attachment *ad fundandam et confirmandam jurisdictionem* in accordance with the Roman Dutch law as applied in Scotland. The compromise was accordingly an attempt to meld two separate systems on the basis of a misunderstanding of both used as an example.

<sup>42</sup> Berlingieri, *op cit*, 324. The full text of the Convention is at 323-7.

<sup>43</sup> *The Banco* [1971] 1 All ER 524, 532b. Lord Diplock said in his speech in *The Jade The Escherheim: Owners of the motor vessel Erkowit v Owners of the ship Jade, Owners of cargo lately laden on board the motor vessel Erkowit v Owners of the ship Escherheim* [1976] 1 All ER 920 (HL) 923 h-i that: ‘The provisions of art 3 represented a compromise between the wide powers of arrest available in some of the civil law countries (including for this purpose Scotland) in which jurisdiction to entertain claims against a defendant could be based on the presence within the territorial jurisdiction of any property belonging to him, and the limited powers of arrest in England and other common law jurisdictions, where the power of arrest was exercisable only in respect of claims falling within the admiralty jurisdiction of the court and based on a supposed maritime lien over the particular ship in respect of which the claim arose.’ The complexities that arise in the United Kingdom as a result of the failure to make the Convention

compromise was to balance the interests of shipowners and operators on the one hand and cargo interests on the other by avoiding arrests of vessels and the consequent interruption of voyages and disruption of trade where the claims had no connection with the operation of the vessel.<sup>44</sup> In civil law countries the scope for the arrest of vessels was limited to the specific claims mentioned in the Convention and confined to vessels in the same ownership. In accepting this limitation the civil law countries sought to secure the benefit for their own vessels and cargo that they would only be vulnerable to arrest in other Contracting States for the same set of claims and to the same extent. In the common law countries the adoption of the Convention would result in the possible scope of arrest in admiralty actions *in rem* being extended to include a sister ship but otherwise limited to the same set of claims. With the Convention being ratified or acceded to by seventy-seven countries<sup>45</sup> including most major maritime nations<sup>46</sup> its adoption or incorporation into national law has provided a reasonably consistent framework within which the arrest of ships can take place throughout the major maritime nations of the world.<sup>47</sup>

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a part of municipal law are dealt with in *The 'Nordglint'* [1987] 2 Lloyd's Rep 470 (QB (Adm Ct)) 478-480. See also for similar problems in other jurisdictions Kirchner A, *Maritime Arrest: Legal Reflections on the International Arrest Convention and on Domestic Law in Germany and Sweden* (2001), 2-3. This is a thesis submitted for the degree of Master of International Law in the University of Stockholm and available at [www.andreekirchner.de/pub/arrest.pdf](http://www.andreekirchner.de/pub/arrest.pdf)

<sup>44</sup> Report of the Chairman of the CMI international sub-committee to the Lisbon Conference of the CMI printed in Berlingieri, *op cit* 482 *et seq.*

<sup>45</sup> CMI year book 2001

<sup>46</sup> As with most international conventions the USA is the most notable exception. South Africa is also not a party to the Convention

<sup>47</sup> Kirchner, *op cit*, 54 is a little more reserved in his assessment. He says: 'The development of unification of law connected to maritime arrest, however, is not only insufficiently established, but rather unwanted by most States. The preparatory works of both the 1952 and 1999 Arrest Convention show that most states are not willing to sacrifice their legal practice to the benefit of a common legal practice. Hence the *lex fori* is still applicable.' His concern is that many States have incorporated the Arrest Convention subject to domestic reservations or qualifications and that courts are inclined to interpret it subject to domestic norms thereby leading to different applications of the same provision and hence a lack of uniformity. There is undoubtedly merit in this view but it perhaps exaggerates the areas of difference without paying sufficient regard to the great areas of uniformity arising

### 3. SOUTH AFRICA AND THE ARREST CONVENTION:

Prior to the process of reform leading up to the passage of the Act in 1983 there is nothing to suggest that South Africa contemplated accession to the Arrest Convention. Whether this was due to inertia; the relatively quiescent state of maritime law and practice or political issues, or possibly a combination of the three is unclear.<sup>48</sup> However, when the process of reform got under way local legal practitioners in the maritime field were keen to ensure that the system of admiralty law and jurisdiction that would ultimately result would reflect the provisions of the Arrest Convention in a form recognisable to their overseas clients. It was natural therefore that it would be in the forefront of the thinking of the draftsmen of the Act<sup>49</sup> and this is evident from the first draft of the legislation with its reliance on the maritime claims covered by the Arrest Convention and its express incorporation (albeit in amended form) of the provisions of a sister ship arrest.

However the influence of the Arrest Convention in the drafting of the legislation did not necessarily mean that it would lead to the introduction of any novel concept in South African law or any departure from existing well-established principle. Sister ship arrests extended to the admiralty action *in rem* something that was already possible under the Roman Dutch law as applied in South Africa by way of an attachment *ad fundandam et confirmandam jurisdictionem*. Whilst they extended the scope of the action *in rem* it was nonetheless the property of the same debtor that was being rendered subject to arrest. It must be borne in mind that in the application of English common law it is not a novel concept that all the property of a debtor is available to

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from the Convention, particularly as a result of the development of an agreed list of maritime claims and the exclusion of arrests in many areas where they would otherwise have been permissible.

<sup>48</sup> Accession to the Convention was probably not politically feasible at the time given the suspension of South Africa from the General Assembly of the United Nations and its pariah status in world politics. These difficulties are noted in paragraph 13 of the Law Commission Report. In any event it is highly debatable whether an insular government obsessed with internal political issues and engaged in endeavours to resist what it described as a 'total onslaught' from abroad, would have been minded to seek accession to such a Convention.

<sup>49</sup> The Arrest Convention is referred to in both the 1970 and the 1980 memoranda as well as in the Law Commission Report. It was particularly relevant to the formulation of the list of maritime claims in the Act. *Katagum Wholesale*

satisfy a claim against that debtor, once the claim is reinforced by a judgment. The essential difference between Continental and common lawyers in regard to the arrest of property related to the timing of that arrest and the circumstances in which an arrest was permissible. In Europe all proceedings were directed against the debtor and all property of the debtor was subject to conservatory arrest (*saisie conservatoire*) prior to judgment and execution after judgment. The English common law did not in general permit conservatory arrest<sup>50</sup> but all property of a judgment debtor was available for the purposes of execution. In admiralty proceedings *in rem*, however, an initial arrest of the specific vessel in respect of which the claim had arisen was permitted but, in general, only that vessel was available for the purpose of execution.<sup>51</sup> The effect of the Arrest Convention was to agree upon a single list of claims for which vessels could be arrested; to extend the liability to arrest *in rem* to sister ships in England and other jurisdictions applying English admiralty law and to confine civil law jurisdictions to the arrest of a single vessel. Whilst the precise combination of these elements was different in the proposal for a revision of South African admiralty law and jurisdiction none of it involved the adoption of a novel legal principle so far as South African lawyers were concerned.

The departure from well established principle in South Africa came with the suggestion that not only vessels in the same legal ownership should be subject to arrest in proceedings *in rem*, but also all vessels in which the benefits of ownership were centred in a single person or persons even though those vessels were operated and control over their operations was exercised through corporate structures that meant that they were not in law owned by the same person. Sister ship arrests did not raise this issue because the identity of the debtor remained the same even though the range of potential targets of arrests was expanded. However, the proposal in regard to associated ships not only meant that the vessel to be arrested need have no connection with the maritime claim, but also that the legal owner of the vessel need not be the debtor in respect of the

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*Commodities Company Limited v The m.v. Paz* 1984 (3) SA 261 (N) at 267D. Staniland 'Developments in South African Admiralty Jurisdiction and Maritime Law' 1984 *Acta Juridica* 271 273.

<sup>50</sup> This was the case until the development of the *Mareva* injunction.

<sup>51</sup> This statement is subject to the decision in *The Dictator* [1892] P 304.



claim. This distinction was clearly recognised in the judgments in *The Berg*.<sup>52</sup> In the Full Bench decision Milne JP said:

‘There is no doubt that s 3(6) and (7) do create a new remedy and give in fact a more effective remedy to marine claimants. Where however, that new remedy is given to a marine claimant in respect of an entirely new party who was not, when the claimant’s cause of action arose, liable in contract or delict to the marine claimant, what has been created is not merely a more effective remedy, but a new right: or to put it another way, a right to sue a person who could not, on any basis, have been sued before the Act was passed.’<sup>53</sup>

Miller JA echoed this in the Appellate Division when he said:

‘It is true that s 3(6) read with s 5(3) describes a method for recovery of money due to one who has suffered injury or loss for which he has a maritime claim, but it does much more than that; *it gives to the claimant a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him*. It provides the claimant not only with a method for recovery but with an additional or alternative defendant. And by that token it is creative of new liabilities or obligations in owners of ships, or the potential thereof, of which such owners, if the claims arose prior to the commencement of the Act, would have been wholly unaware and unsuspecting.’<sup>54</sup>

These two judgments highlighted the fact that when the associated ship provisions of the Act are used to arrest not a sister ship but an associated ship in the extended sense given to that expression by the Act, this is not simply a means of bringing the same claim against a different target but a means of bringing a claim against a juristic person which does not, apart from the availability of this procedure, owe any liability to the claimant in respect of the claim.<sup>55</sup>

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<sup>52</sup> *Euromarine International of Mauren v The Ship Berg* 1984 (4) SA 647 (N) and 1986 (2) SA 700 (A).

<sup>53</sup> At 661H-I.

<sup>54</sup> At 711 G-I.

<sup>55</sup> The fact that a person other than the debtor becomes liable for the maritime claim in the case of a true associated ship arrest going beyond the case of a sister ship raises the constitutional question of whether such a procedure is compatible with the constitutional guarantee of property rights embodied in section 25 of the Constitution as analysed by the Constitutional Court in *First National Bank Limited t/a Wesbank v Commissioner, South African Revenue Services and another* 2002 (4) SA 768 (CC). That case dealt with provisions in the Customs and Excise Act 91 of 1964 that rendered the property of a person other than the customs debtor liable to be attached and sold as a

As pointed out above insofar as the associated ship provisions merely cover the same ground as the sister ship arrest under the Arrest Convention they do not involve any significant departure from existing principle either nationally or internationally. However, where the associated ship arrest provisions go beyond this they breach two of the fundamental principles of company law. These are firstly the principle of corporate personality that a company or similar corporate entity is a juristic person separate and distinct from the natural persons who stand behind it and enjoy the ultimate fruits of corporate endeavour and, secondly, the principle of limited liability. These two central principles provide the pillars on which much of the world's commerce rests.<sup>56</sup> They were encapsulated in the speech of Lord MacNaughten in *Salomon v Salomon & Co.*<sup>57</sup> where he said:

‘The company is at law a different person altogether from the subscribers ... and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act.’

That passage admirably sums up both the separate legal personality of the company and the limited liability of its members.

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means of recovering the customs debt. This question will be considered later together with other constitutional questions raised by the Act.

<sup>56</sup> An interesting and readable history of the development of companies and their influence on the world economy is to be found in J Micklethwait and A Wooldridge, *The Company: A Short History of a Revolutionary Idea* (2003). The first and most influential economic analysis is that by A A Berle and C G Means *The Modern Corporation and Private Property* (1933; reprint 1968). The technical legal background is set out in P L Davies, *Gower's Principles of Modern Company Law*, 6<sup>th</sup> Ed (1997), chapters 2-5, 18-91. For a South African perspective see Blackman et al, *Commentary on the Companies Act*, Vol. 1, 4-108 to 4-114.

<sup>57</sup> [1897] AC 22 (HL) 51. Gower, *op cit* 77 refers to this as a ‘justly celebrated’ case. The principles in that judgment were approved and adopted in South Africa in *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 550.

Where the Act permits the arrest of a true associated ship<sup>58</sup> these principles are breached because the maritime creditor is thereby enabled to go behind the corporate structure to identify the person or persons who own or control the corporate entity and then to pursue its claim either against a vessel owned by that person or persons or more frequently against a vessel owned by another company altogether. In other words the disregard of corporate personality can occur in both directions - upwards to the controlling interests of the corporate entity owning the ship concerned and then downwards from those controlling interests to a ship owned by another corporate entity controlled by the same interests. This does more than pierce the corporate veil. It disregards entirely the separate corporate existence of the different companies in the group and renders the assets of those companies, that is, all the ships in the fleet, vulnerable to arrest at the instance of creditors of any of the companies in the group.

Although the South African Law Commission report described this as an 'extension' of the sister ship jurisdiction under the Convention on closer analysis it is difficult to accept this as wholly accurate. The Arrest Convention did not extend the scope of liability for maritime claims but aimed at finding a *via media* between two existing arrest regimes in the field of modern law, both of which survived in South African maritime practice, but neither of which rendered the property of any person other than the debtor in respect of the maritime claim vulnerable to arrest. As the Arrest Convention had limited the scope of arrest in civil law jurisdictions logically an extension of its limits would have involved the removal of the constraint introduced in article 3(1) that restricted arrest to either the particular ship in respect of which the maritime claim arose or any other ship. In that way the existing liability of a particular shipowner would be capable of being pursued by expanding the jurisdiction to arrest vessels owned by that shipowner not only to the particular ship or a single sister ship but to any sister ship. In other words a logical extension of the sister ship provisions of the Arrest Convention would be a movement towards the

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<sup>58</sup> That is a ship other than a sister ship separately owned by a person or corporation other than the owner of the ship concerned, that is, the ship in respect of which the claim arose. The expression 'true associated ship' is used to denote such a vessel.

traditional civil law view of arrest as being available in respect of any property of the maritime debtor. However, this is said not to be the intention of the Act.<sup>59</sup>

Ordinarily when something is described as an extension of a pre-existing situation the notion that is being conveyed is that of engaging in a process of sequential progression along a particular path. An extension of the sister ship arrest provisions of the Arrest Convention would involve a broadening of those provisions but without introducing a new and entirely different basis of liability on the part of a different person. It is difficult to see any natural progression from provisions that in civil law countries restricted the ambit of pre-judgment arrest and in countries that apply English admiralty law expanded it, to a provision that attaches liability not on the basis of ownership of the ship in respect of which the claim arose or on the basis of an arrest of the property of the debtor, but on the basis of the far more amorphous concept of common control of vessels or the corporate entities through which ownership of vessels is exercised. As Professor Berlingieri points out<sup>60</sup>, save in the unusual case of a maritime lien, it is fundamental to the operation of the Arrest Convention that the person liable in respect of the maritime claim is the owner of the vessel to be arrested. It is correct that article 3(4) of the Arrest Convention provides a limited exception to this in the sense that in some circumstances the arrest of a ship is permitted where that ship was at the time the claim arose chartered by demise and the demise charterer is liable for the claim. However, that does not support the notion that the true associated ship provisions in the South African legislation are merely an extension of the provisions of the Arrest Convention as the article goes on to provide that ‘any other ship in the ownership of the demise charterer’ may be arrested in respect of such a claim. In other words the application of the sister ship provisions in the context of a demise charter are restricted to vessels owned by the party liable in respect of the maritime claim. A proposal that permits the arrest of property owned by someone who is not liable for the maritime claim involves a substantial

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<sup>59</sup> Shaw, *Admiralty Jurisdiction and Practice in South Africa*, 37. *MV Fortune 22: The Owners of the MV Fortune 22 v Keppel Corporation Ltd* 1999 (1) SA 162 (C). The correctness of that judgment will be discussed later. See M.J.D. Wallis, ‘*The Associated Ship Jurisdiction in South Africa: Choice Assorted or One Bite at the Cherry?*’, [2002] LCMLQ 132

<sup>60</sup> Berlingieri, *op cit.* 52.363 -366, p128-9.

departure from the basic principles embodied in the Arrest Convention in a direction that finds little impetus from the Convention itself.

Whilst it is true that in the drafting process leading up to the enactment of the Act the associated ship provisions, insofar as they went beyond sister ship arrests (the ‘true associated ship’), were treated as being merely an extension of the provisions of the Arrest Convention, it is submitted on closer analysis that this proposition is not justifiable and that it leads one astray to try and interpret these provisions in a manner consonant with the provisions of the Arrest Convention. There can be no doubt that the draftsman of the Act was well aware of the implications of these proposals and their broad scope. That is why he described them as being ‘a substantial extension’ of the sister ship provisions.<sup>61</sup> However, a closer examination of these provisions against the text of the Arrest Convention suggests that the link between them is limited and extreme caution must be exercised in drawing parallels between the associated ship provisions and those of the Convention even where there are linguistic similarities between them. The context is so wholly distinct that it is preferable to seek the meaning of the South African statute without using the Arrest Convention as either a map or compass. Certainly if the roots of and justification for the true associated ship provisions of the Act are to be properly identified the enquirer must look beyond the terms of the Arrest Convention.

#### 4 **PIERCING THE CORPORATE VEIL?**

Rather than taking the Arrest Convention as the starting point and seeking to extrapolate from there to the arrest of and proceedings *in rem* against the true associated ship<sup>62</sup> it is helpful to examine the basis upon which the suggestion to adopt this extended jurisdiction was proposed. That was the changing pattern of ship ownership that had seen an ever-growing proportion of shipowners moving away from national registries and registering their vessels under flags of

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<sup>61</sup> *Supra*, p 17.

<sup>62</sup> That is not a sister ship or a vessel in common ownership.

convenience, usually in ‘one-ship companies’.<sup>63</sup> This had started a few years before the conclusion of the Arrest Convention and it was more a matter of coincidence than one of cause and effect that the trend in this direction existed in parallel with the implementation and operation of the Convention. After all sister ships had always been liable to arrest in respect of maritime claims in civil law jurisdictions and that had not previously caused owners to seek to insulate one vessel from arrest in respect of debts owed in relation to another vessel. That is not to say that an awareness of this commercial advantage would not have been a factor in weighing up the benefits of moving to a flag of convenience registry. In England, which during this period was probably the leading maritime jurisdiction in the world in terms of the volume of maritime litigation dealt with by its courts, the sister ship arrest represented an extension of the remedy available in an action *in rem* in courts applying English admiralty law.<sup>64</sup> It is therefore certainly feasible that shipowners took into account this added vulnerability to arrest in the world’s leading maritime jurisdiction in weighing up the commercial advantage of moving to a flag of convenience registry. However there is nothing to indicate that this was the driving force behind the move to these registries and those who have investigated the question do not suggest any such causal link or indeed any connection at all.<sup>65</sup> As a matter of logic the favourable tax and regulatory regimes

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<sup>63</sup> 1980 Memorandum, para. 6. The growth in flag of convenience registrations is traced in Chapter 3.

<sup>64</sup> In addition to litigation before the courts it was also the leading centre of maritime arbitration but this was not a relevant factor because the United Kingdom did not adopt the provisions of the Arrest Convention (Article 7, paras 1 to 4) that each country should make provision in its domestic law for ships to be subject to arrest in respect of claims referable to arbitration. *The Cap Bon* [1967] 1 Lloyd’s Rep 543 (Adm); *The Rena K* [1979] 1 All ER 397 (QBD); [1978] 1 Lloyd’s Rep 545 [QB (Adm Ct)]; *The Maritime Trader* [1981] 2 Lloyd’s Rep 153 [QB (Adm Ct)]. Unlike the case of the choice of a foreign jurisdiction where the court would take into account in deciding whether to order a stay whether the claimant would thereby lose any security established in England (*The Eleftheria* [1969] 1 Lloyd’s Rep 237 (Adm)) these cases held that a similar route could not be followed in the case of arbitration clauses.

<sup>65</sup> Boczek, *op cit*, 26-27 cites the conclusion of the OEEC study (1958) that ‘there are two main motives actuating those shipowners who have adopted the practice of registering under flags of convenience, viz opportunities for avoiding taxation on the earnings of ships registered under these flags and in some cases relief from high crew standards and consequent operating costs.’ In testimony before the United States House of Representatives in 1957 the Maritime Administrator listed seven advantages flowing from the transfer of US ships to foreign flags, namely: ‘1) Transfer to a foreign flag increases the market value of a ship. 2) Transfer reduces operating costs, particularly the wages and maintenance of good working conditions, due to lower standards permissible under foreign flags. 3) Transfer makes possible operating in world trade with easy currency conversion. 4) Transfer allows the owner to avoid United States Coast Guard requirements concerning the condition of his vessel. 5) The owner may effect repairs abroad at less cost than the same repairs in the United States. 6) The owner can save money by avoiding United States income tax. 7) And ultimately, as a result of increased earnings, the owner’s financial ability to acquire

that they provided in conjunction with their ability to cast a cloak of anonymity over those who stood behind the 'one-ship companies' would have provided far more powerful incentives to move in this direction.<sup>66</sup>

Nonetheless with these changes in the pattern of ship ownership it was apparent by the time the South African statute was being debated that the introduction in South Africa of a sister ship arrest provision in accordance with the Arrest Convention would add little that would be of advantage to claimants to the existing jurisdiction to arrest the ship in respect of which the claim had arisen. The reason was that fewer and fewer sister ships existed and the result was that the sister ship arrest jurisdiction arising from the Arrest Convention was largely ineffectual.<sup>67</sup> This posed a problem to those who saw the Act as providing an opportunity to develop South Africa

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new tonnage is improved.' Boczek, *op cit*, 30. He goes on to say that for Europeans savings in operating costs were less relevant. In the case of Greek shipowners, who formed a substantial part of the movement to flags of convenience, he gives political instability in Greece after the Second World War, the risks of nationalisation by a socialist government and heavy taxation as the principal issues. As regards other European shipowners the benefit of liberal taxation regimes and the competitive advantage enjoyed by American shipowners who had moved their vessels to flags of convenience are given as reasons. In other words the principal motives were a desire to reduce costs - perhaps not unmixed by a desire to sap the power of powerful maritime trade unions - and avoid tax. What is significant is that there is not the slightest indication that a desire to avoid the sister ship provisions of the Arrest Convention played any role whatsoever in this process. Similarly in the conclusions of the 1981 UNCTAD report cited by Coles and Ready, *op cit*, 2.21, 20 there is no reference to this as a problem although there is a statement that 'Real owners can change [conceal?] their identities by manipulating brass-plate companies and consequently avoid being identified as repeated sub-standard operators or risk-takers.' This has nothing to do with the matter under consideration. G W Keeton, '*Lessons of the Torrey Canyon: English Law Aspects*' (1968) 21 Current Legal Problems 94 110 says that 'a proliferation of one-tanker companies' was a 'reply' to the introduction of sister ship arrests in England in 1956 in terms of the Administration of Justice Act and this is sometimes cited as authority for the proposition that one-ship companies were a response to the altered arrest regime introduced by the Arrest Convention. However it is not clear that he meant to suggest that there was a causal link between the two phenomena especially as he had noted on the previous page that the reasons for oil companies registering oil tankers under flags of convenience were 'mainly financial'. That is consistent with the more extensive study by Boczek. It is interesting to note however that Keeton's remedy for the problems posed by the one-ship company bears a close resemblance to the associated ship when he says that sister ship arrests should be available 'to reach the company which effectively controls the subsidiary, and to make the ships of any subsidiary effectively controlled by the same company liable to arrest.'

<sup>66</sup> The delegate of the International Chamber of Shipping to the discussions leading up to the 1999 Convention said in regard to a proposal by the United Kingdom to introduce an associated ship arrest: 'Some of the delegations have given the impression that the sole purpose of single ship companies is to circumvent the sister ship provisions and we feel that this is really not the case. The main reason for the growth in single ship companies is an economic one; it is really to reduce the shipowner's operating costs' Berlingieri, *Arrest of Ships*, 584.

as a desirable maritime jurisdiction. Apart from cargo claims in respect of inward-bound cargo and a limited number of claims arising from the hazards of navigating the oceans off the coast of South Africa or simply the rigours of a lengthy journey round the Cape in a less than seaworthy vessel, maritime litigation in South Africa had little to offer that was not available elsewhere. In addition it was situated at some considerable distance from the world's major commercial centres and was at the time in the process of acquiring a political status as a pariah in world affairs. Its legal system was respected at a commercial level but largely untried when it came to dealing with matters of international trade. None of this was conducive to its establishment as a major centre of international maritime litigation. However a considerable number of vessels passed the South African coast and called at its ports. By and large, however, they were not vulnerable to arrest or attachment in South Africa because of the separate legal ownership of the vessels, notwithstanding the fact that they may have been operated as part of a single fleet under the control of a well known and identifiable shipowner. If South Africa was to become an attractive maritime jurisdiction it would have to provide a broader basis for claimants to pursue and secure their claims and the obvious route was to attack the practice of operating a single fleet - sometimes even one operating as a liner service - by means of a number of vessels owned by one-ship companies.

All the indications are that this was the key consideration underpinning the introduction of the broader associated ship jurisdiction rather than a simple incorporation of the sister ship provisions of the Arrest Convention and some extension of those provisions. Inherent in the suggestion put to the South African Law Commission by the MLA was a bias in favour of claimants rather than defendants. At that time it is doubtful whether there was a strong lobby on behalf of shipowners in South Africa and no such voice appears to have made itself heard either within the MLA or in representations to the Law Commission. The thrust of those representations

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<sup>67</sup> An attempt to suggest that ships owned by separate one-ship companies under common control were sister ships for the purposes of the Supreme Court Act 1981, the successor to the Administration of Justice Act 1956 which gave effect in England to the Arrest Convention, was rejected in *The Evpo Agnic* [1988] 3 All ER 810 (CA).



and the pressures in favour of innovation came therefore from the side of maritime claimants and their underwriters to whom any extension of the ability to recover of a claim would appeal.<sup>68</sup>

In the process the suggested link between the formation of one-ship companies and avoidance of the sister ship provisions of the Arrest Convention was elevated into a justification for this extension of the powers of arrest in admiralty proceedings. This was not a link that was made at first. The explanatory memorandum<sup>69</sup> merely drew attention to the tendency towards the formation of 'one-ship companies' in the years since the inception of the Arrest Convention so that few vessels were now available to be arrested as sister ships. The suggestion 'that it would be desirable to endeavour to deal with this situation' was given form in the associated ship provisions and that was an end to the matter. Clearly, however, the perception was that the tendency towards registering vessels in one-ship companies was driven in some substantial measure by a desire to avoid the sister ship provisions of the Arrest Convention. This is reflected in the South African Law Commission Report<sup>70</sup>:

'The International Convention with regard to the Arrest of Sea-going Ships ... makes provision for the arrest to found an action *in rem* of a sister ship, that is to say, a ship in the same ownership as the guilty ship. The provisions of the Bill are an extension of this notion *based on the fact that since the conclusion of the Convention its provisions have been defeated by the proliferation of 'one-ship companies'*, that is to say, companies owning only one-ship and therefore avoiding the Convention.' (My emphasis)

That notion was echoed by other commentators for example those who wrote in regard to the sister ship arrest provisions of the Convention that:

'However, a stratagem was adopted in order to defeat this provision. A proliferation of 'single-ship' companies - variously described as 'asset-poor' or 'brass-plate' concerns - occurred. Because of the separate legal personalities of such companies, the claimant

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<sup>68</sup> H Staniland and J S McLennan '*The Arrest of an Associated Ship*' 1985 SALJ 148 149 comment that: 'It has been rumoured that the provision was welcomed by underwriters in London on the basis that it could lead to a drop in insurance claims.'

<sup>69</sup> 1980 Memorandum, para. 6.

<sup>70</sup> South African Law Commission Report, para. 7.3

could proceed against only the ‘guilty ship’. But such ships are notoriously elusive, and, even when one is arrested, it usually happens that the amount of the claim exceeds the value of the ship.’<sup>71</sup>

This perception that the creation of one-ship companies and the accompanying fragmentation of ship ownership is somehow improper or an abuse was and remains widespread<sup>72</sup>. Shaw says that it was ‘often referred to in such pejorative terms as a scheme or device.’<sup>73</sup> It is understandable therefore that in justification of the associated ship jurisdiction resort was had to the language of company law and the ability of courts in appropriate circumstances to lift or pierce the corporate veil. Indeed this was the very justification advanced by the Minister of Justice for this innovation in his speech on the Second Reading of the Bill<sup>74</sup> where he claimed that it extended the principle of South African law which he expressed as following:

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<sup>71</sup> Staniland and McLennan, *op cit*, 148. The same point is repeated in H Staniland ‘*the Implementation of the Admiralty Jurisdiction Regulation Act in South Africa*’ 1985 LCMLQ 462 468. Shaw, *op cit*, 36 writes: ‘*As the result of the Convention*, many shipowners took the step of registering so-called ‘one-ship’ companies which had, among other advantages, the advantage that their vessels would not be subject to arrest for claims against ships owned, not by the same company but by what can loosely be called sister companies, in which the shares were either immediately or ultimately controlled by the same person as owned the shares in the company owning the ship in question.’ (My emphasis). Hare, *op cit*, 104 strikes the same note by suggesting that: ‘In fact, it was this self-same legitimization of the sister ship procedure in the eyes of the international community which contributed to its downfall as an effective means of recovering debts of one-ship from another: ship owning companies were quick to limit the exposure of their fleets by re-financing their ships into one-ship companies.’

<sup>72</sup> The difficulty of escaping from such a widespread perception is apparent when one reads the same explanation for the rise of one-ship companies in the recent work by Derrington S C and Turner J M, *The Law and Practice of Admiralty Matters* (2007), para 5.24 citing as their authority for this proposition the South African Law Commission Report. The authors appear to recognise in para 5.25 that the associated ship jurisdiction is a policy driven response to the widespread use of one-ship companies. It is similarly repeated as a correct statement of matters by P Glover ‘*Sister Ship Arrest and the Application of the Doctrine of Attachment in Australia: a Jurisdictional Comparative Analysis in the Wake of the 1952 Arrest Convention*’ (2008) 22 A & NZ Mar LJ 99

<sup>73</sup> Shaw *op cit* 37. The writer can vouch for this from his own experience at the time and there are references to it in the cases. The majority judgment in *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA), para [10] p 1106 exemplifies the view that these provisions are aimed at people who are ‘presenting a false picture to the outside world’. The same point is to be found in other judgments and in academic articles. Friedman J in 1986 SALJ 678 679 said that: ‘The fact, therefore, that the Act provides far-reaching and even revolutionary methods to prevent recalcitrant debtors from evading their legal debts, for example by the simple ruse of creating ‘single-ship’ companies, is, in my view, something to be welcomed, not deprecated.’ These references to ‘recalcitrant debtors’, ‘evading their legal debts’ and ‘ruse’ are very different from his stance in a case where it was sought to pierce the corporate veil on this basis. Like the English and certain other courts he rejected that attempt on the basis that the structure was a legitimate use of corporate personality. See footnote 80 *post*.

<sup>74</sup> House of Assembly debates (Hansard) 11 August 1983, column 11172

‘Although the principle of the sanctity of a separate corporate personality of a company distinct from its members was enshrined in *Salomon v Salomon and Company* [1897] AC 22 (HL), our courts should brush aside the veil of corporate identity time and time again where fraudulent use is made of the fiction of legal personality.’<sup>75</sup>

Once again, however, close examination suggests that the foundation is lacking for this resort to company law for a justification of the associated ship arrest provisions in their broadest significance. Even a brief consideration of the relevant principles of company law demonstrates that this is so. The starting point is the doctrine that the company is a separate juristic person from its shareholders and that the latter can lay no claim to its assets, which vest in the company not them. The notion of the company as a distinct legal person is not lightly to be disregarded. As one of our greatest judges, Innes CJ said:

‘This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members.’<sup>76</sup>

That view was echoed by Corbett CJ nearly seventy-five years later when he said:

‘... it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity ...’<sup>77</sup>

That central principle of company law forces us to confront the circumstances in which the court can go behind the legal personality of a company either to attach a liability to its shareholders that they would not ordinarily bear or to render susceptible to attack assets that would otherwise be inviolable. Those circumstances are limited as Corbett CJ made clear in the same passage when he went on to say that:-

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<sup>75</sup> Quoted by Staniland and McLennan *op cit*, 148.

<sup>76</sup> *Dadoo Limited and others v Krugersdorp Municipal Council* 1920 AD 530 550-1.

‘... the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify ‘piercing’ or ‘lifting’ the corporate veil... I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs, in this connection the words ‘device’, ‘stratagem’, ‘cloak’ and ‘sham’ have been used....’<sup>78</sup>

This is not the occasion on which to explore in any great detail the ambit of the concept of piercing or lifting the corporate veil<sup>79</sup>. In any event the law in that regard is far from settled.<sup>80</sup> Some principles are, however, reasonably clear. Firstly the court does not have a general discretion simply to disregard a company’s separate legal personality whenever it considers it just

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<sup>77</sup> *Shipping Corporation of India Limited v Evdomon Corporation* 1994 (1) SA 550 (A) 566C-D. See also *Francis George Hill Family Trust v South African Reserve Bank and others* 1992 (3) SA 91 (A) 102F-H.

<sup>78</sup> *Shipping Corporation of India v Evdomon Corporation*, *supra*, 566D-F. The usefulness of these epithets has been questioned and the Court of Appeal of New South Wales said in *ICT Pty Ltd v Sea Containers Ltd* [1995-96] 39 NSWLR that: ‘The theory which justifies the piercing of the corporate veil is not explained by the use of such epithets as ‘sham’ or ‘device’.’ See the discussion in Loh Siew Cheang and William M F Wong, *Company Law: Powers and Accountability*, (2003), 18-23. The problem with these expressions is that they suggest a situation of unreality whereas all too often the endeavour to invoke the doctrine arises in circumstances where the relevant parties have deliberately structured their transaction in a particular way in order to achieve or avoid a particular result.

<sup>79</sup> There are comprehensive discussions in the leading textbooks on company law. See for example *Henochsberg on the Companies Act* (5<sup>th</sup> Ed), Vol 1, 53-55; Blackman *et al*, *op cit*, 4-133 to 4-150; *Gower and Davies’ Principles of Modern Company Law*, (7<sup>th</sup> Ed) 181-190; Loh Siew Cheang and William M F Wong, *op cit*, 4-41; B Hannigan, *Company Law*, 63-88; Cheong-Ann Png, *Corporate Liability: A Study in Principles of Attribution*, 142-148. J.T. Pretorius *et al*, *Hahlo’s South African Company Law through the Cases*, 6<sup>th</sup> ed. (1999), contains references to a number of articles, both South African and foreign, on the topic. The two concepts may be different. In *Atlas Maritime Co SA v Avalon Maritime Ltd The Coral Rose (No 1)* [1991] 4 All ER 769 (CA) 779f-h Staughton LJ said: ‘Like all metaphors, this phrase [the corporate veil] can sometimes obscure reasoning rather than elucidate it. There are, I think, two senses in which it is used, which need to be distinguished. To *pierce* the corporate veil is an expression I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind* it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.’

<sup>80</sup> *Cape Pacific Limited v Lubner Controlling Investments (Pty) Limited* 1995 (4) SA 790 (A) 802H. Friedman J described it as ‘the rather nebulous principle of company law of ‘piercing the corporate veil’’. D B Friedman ‘*Maritime Law in Practice and in the Court*’ 1985 SALJ 45 56. The case to which he refers in the article is the unreported case of *Sanko Steamship Company Ltd v Bear Ships Incorporated and others*, Case No 4080/84 (DCLD). It involved a contention that the operation of a fleet of ships, each of which was owned by a separate one-ship company, created circumstances that warranted the invocation of this doctrine. The contention was rejected.

to do so.<sup>81</sup> The basic reason for piercing the corporate veil or disregarding the separate legal personality of a corporate entity is that the circumstances reveal fraud, dishonesty or other improper conduct.<sup>82</sup> The nature of the impropriety on which reliance is placed will depend upon the situation but it must reveal an abuse or misuse of corporate personality, which can take place either at the time of establishment of the company or thereafter in the course of conduct of its affairs.<sup>83</sup> The mere fact that the use to which corporate personality is put in a particular case may result in very odd situations indeed, such as the case where a company's sole beneficial shareholder, was also its sole employee and in the former capacity contracted with himself in the latter capacity, does not of itself justify disregarding the corporate personality of the employer company.<sup>84</sup> In summary it is probably correct to say that the court:

‘ ... [will] not permit the notion of legal entity to be used to ‘justify wrong, protect fraud or defend crime’.<sup>85</sup>

However, it is also undoubtedly true, as Lord Keith of Kinkel has said:

‘ ... that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts.’<sup>86</sup>

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<sup>81</sup> *Cape Pacific Limited v Lubner Controlling Investments (Pty) Limited*, *supra*, 803A-B; *Botha v Van Niekerk en ‘n Ander* 1983 (3) SA 513 (W) 524A; *Blackman et al*, *op cit*, Vol. 1 4-133

<sup>82</sup> *The Shipping Corporation of India Limited v Evdomon Corporation and Another*, *supra*, 566C-F; *Cape Pacific Limited v Lubner Controlling Investments (Pty) Limited*, *supra*, 803H-J.

<sup>83</sup> *Cape Pacific Limited v Lubner Controlling Investments (Pty) Limited*, *supra*, 803J-804E.

<sup>84</sup> *Lee v Lee's Farming Limited* [1960] 3 All ER 420 (PC). Professor Gower refers to a case during the Second World War when all of the shareholders of a private company were killed by a bomb but the company itself survived (presumably with the estates of the deceased as shareholders) and an Australian case where both shareholders in a private company were killed in a motor collision. See the review of this situation in *Neufeld v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] 3 All ER 790 (CA).

<sup>85</sup> Van den Heever JA in *Cape Pacific Limited v Lubner Controlling Investments (Pty) Limited*, *supra*, 810D quoting *United States v Milwaukee Refrigerator Transit* 142 Fed 247 (1905) 255, which is in turn quoted by Domanski ‘*Piercing the Corporate Veil - A New Direction?*’ (1986) 103 SALJ 224 232.

<sup>86</sup> *Woolfson v Strathclyde Regional Council* 1978 SLT 159 161, quoted in *Adams and Others v Cape Industries plc and Another* [1991] 1 All ER 929 (CA) 1022c and again with approval by Van Heerden JA in *Cape Pacific Limited v Lubner Controlling Investments (Pty) Limited*, *supra*, 811.

The maritime context against which these principles fall to be considered is the operation by an individual shipowner<sup>87</sup> of more than one vessel and sometimes a substantial fleet of vessels the operations of which are managed and conducted centrally, although each is owned by a separate corporate entity. In other words the problem is one of a group of companies, each of which owns a vessel, operating co-operatively in the field of maritime endeavour. From an economic perspective the group of companies may be viewed as a single economic unit and the appearance they give to the world is that of a single economic unit. However, the law has generally been reluctant to disregard the separate legal personalities of the companies constituting the group in favour of a concept more attuned to economic reality. Thus in *R v Milne and Erleigh* (7)<sup>88</sup> Centlivres CJ said:-

‘There is no *persona* which is the group, and there are no interests involved except the interests of the companies and the interests of the controllers. This is not mere legal technicality... no businessman would be deceived into thinking that in a group there is, in effect, a pooling of assets and a right in the controllers to deal with assets belonging to the companies without regard to their respective interests.’

Of course that was in the context of a criminal case where the controllers of the various companies had done precisely what the court held no businessman would be deceived into thinking was the situation with a group of companies, namely a pooling of their assets and permitting the controllers to deal with assets belonging to the different companies without regard to their respective interests. The passage in question was not a statement that this could not occur

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<sup>87</sup> The expression is intended to go beyond the notion of legal ownership to beneficial ownership. In other words it comprehends the person or persons who ultimately profit from the operation of the vessel. It is in this sense that the expression is used in all the discussions concerning the use of flags of convenience.

<sup>88</sup> 1951 (1) SA 790 (A) 828. This approach is not unique to South Africa. Lord Morton in *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725 (HL) 734 h-i said that: ‘... each company in the group is, in law, a separate entity, the business of which is to be carried on by its own directors and managing director, if any ...’ In a maritime context Roskill LJ (as he then was) said that it was a fundamental principle of English law long established and now unchallengeable by judicial decision that: ‘... each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law. It is perhaps possible under modern commercial conditions to regret the existence of these principles. But it is impossible to deny, ignore or disobey them.’ *The Albazero* [1975] 3 All ER 21 (CA) 28h-29a. Hannigan, *Company Law*, 74-82.

but a reiteration of the principle that if it did occur criminal consequences might follow. It might also be added that in accordance with the general principles governing piercing of the corporate veil in such circumstances a court might be willing to pierce the corporate veil. Whatever care must be taken in considering that passage it nonetheless reflects a broad reality in regard to the approach that courts will adopt towards the operations of a group of companies. The espousal in England of a more flexible approach<sup>89</sup> appears to have been short lived.<sup>90</sup> As a general proposition it is submitted that the mere fact that there are a number of separate companies within a group consisting of a holding company and various subsidiaries is no basis for disregarding their separate existence. Ordinarily they are to be treated as separate legal entities in the absence of some substantial reason for disregarding their separate juristic existence. In the maritime context the mere fact that a number of separate ship owning companies pool their assets under a single system of management in order to secure benefits of scale, does not justify treating the assets as being in common ownership.<sup>91</sup>

Even the most cursory consideration of these principles reveals that they provide no justification for the true associated ship jurisdiction unless one is willing to tar with the brush of

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<sup>89</sup> By Lord Denning MR in *DHN Food Distributors Limited v London Borough of Tower Hamlets* [1976] 3 All ER 462 (CA) 467 where he cited with approval a passage from the 5<sup>th</sup> edition of Gower's *Principles of Modern Company Law* to the effect that 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group' and added 'this is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent says.' The passage was also cited with approval in *Ritz Hotel Limited v Charles of the Ritz Limited* 1988 (3) SA 290 (A) 314-316, but it appears to be of more relevance in the context of the power of a holding company to represent and act on behalf of its wholly owned subsidiaries than in imposing liability where it would not otherwise exist. It is not repeated in later editions of Gower. The situations where authority to represent a company can be inferred from this type of structure are reflected in cases such as *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 AD 168 and *De Villiers and another NN.O v BOE Bank Ltd* 2004 (3) SA 1 (SCA).

<sup>90</sup> That approach was effectively rejected in *Adams v Cape Industries plc* [1991] 1 All ER 929 (CA) as was the United States approach of asking whether someone is the *alter ego* of the company, an approach which has been used in some American cases to overcome the difficulties posed by 'one-ship' companies. Berlingieri, *op cit*, 52-481 to 52.483, pp177-8. See the general discussion in Gower and Davies' *Principles of Modern Company Law*, *op cit* 181-190; Loh Siew Cheang and William M F Wong, *Company Law: Powers and Accountability*, *op cit*, 23-28.

<sup>91</sup> *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A) 675B-E where the court approved of those passages in the decision in *Adams and Others v Cape Industries plc and Another*, *supra*, where the approach of Lord Denning in *DHN Food Distributors Limited v London Borough of Tower Hamlets*, *supra*, was rejected.

fraud, dishonesty or improper conduct every shipowner who elects to cause a fleet of ships to be registered in the ownership of one-ship companies incorporated in flag of convenience registries<sup>92</sup>. That is a conclusion at which even the most vigorous opponents of flag of convenience registries would probably balk. The fact of the matter is that a decision to register vessels on that basis is a perfectly legitimate business decision entirely justified by the commercial advantages that can flow therefrom.<sup>93</sup> International marine transport is probably the quintessential example of the phenomenon now known as globalisation. The nature of the industry is such that from an operational viewpoint shipowners are highly mobile and in a position to take advantage of fiscal benefits and cost savings that arise if they move their base of operations from one jurisdiction to another. There is no reason why their vessels should remain registered in a high-cost, high-tax jurisdiction when they can with equal ease and no disadvantage be registered in a low-cost, low-tax jurisdiction, particularly if their base of operations for the purposes of management can remain the same. When the jurisdiction in which they wish to register conveniently operates in their own country or one readily accessible to them and poses no problems of access or inconvenience<sup>94</sup> it makes commercial sense to follow that route.

It is no doubt because shipping enterprises that elected to register their vessels in one-ship companies in flag of convenience jurisdictions did so, as a general proposition, for perfectly legitimate and genuine commercial reasons, that endeavours to pierce the corporate veil in relation to shipping groups operated on this basis do not appear to have succeeded on the

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<sup>92</sup> Bradfield, *Guilt by association in South African admiralty law*, [2005] LCMLQ 234 at 240 says that fraud or improper conduct is 'simply presumed' in the associated ship provisions, but this is incorrect and flows from the endeavour to fit these provisions into the straitjacket of 'piercing the corporate veil'. As he recognises earlier in the same article (at 239) the associated ship provisions 'undermine the, for the most part, perfectly legitimate use of the corporate form to limit risk in commercial undertakings generally and in shipping in particular.'

<sup>93</sup> *The 'Maritime Trader'* [1981] 2 Lloyd's Rep 153 (QB (Adm Ct) ). See the comment on that decision by A M Tetterborn, *'The Time Charterer, the One-Ship Company and the Sister-Ship action in rem'* [1981] LMCLQ 507 509 where he wrote that the 'one-ship company is a widespread maritime institution with sound other commercial reasons behind it: proving its use with the specific intention of evading s 3(4) would be a quite exceptional feat ...'

<sup>94</sup> Such as the Bahamas and Marshall Islands registries which operate in London and New York; Vanuatu which is based in New York or Liberia, which is based in New York, but has regional offices in Hong Kong, Piraeus, Monrovia, Tokyo, London and Zurich. See the relevant entries in Coles, *Ship Registration: Law and Practice*, 61-2, 234-5, 287 and 185-7.



occasions that this has been attempted. Reference has been made above to an unreported case in South Africa shortly before the inception of the Act where such an attempt was made and failed.<sup>95</sup> Attempts to follow the same or a similar route failed in England<sup>96</sup>, Hong Kong<sup>97</sup> and Australia<sup>98</sup>. Undoubtedly the reason for this is that whilst such business practices may earn the disapprobation of some they do not involve fraud, dishonesty or improper conduct in the sense in which those expressions are used in the cases.

It follows that the reliance initially placed on the concept of piercing or lifting the corporate veil to justify the introduction of the true associated ship arrest was misplaced. Resort was had to the concept as a justification for this legislative provision but the underlying circumstances in which that doctrine of company law can be invoked were not in general present in shipping enterprises that operated as a single enterprise but registered their vessels in separate one-ship companies. That is not to say that in certain instances there might not have been scope for its application but it was not as a general rule capable of being applied to all. As a justification for the wholesale departure from fundamental principles of company law embodied in the true associated ship arrest it is almost entirely lacking.<sup>99</sup> It is a myth that should be laid to rest and it would be highly desirable to stop using this language to describe the purpose or nature of the associated ship arrest provisions. Unfortunately in the absence of a reasoned alternative it is language that our courts continue to use, whether as a result of habit, a failure of analysis or as fig

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<sup>95</sup> See footnote 73, *ante*.

<sup>96</sup> *The 'Maritime Trader'*, *supra*, 157, right hand column.

<sup>97</sup> *China Ocean Shipping Co v Mitsui Bussan Kaisha Ltd* [1995] 3 HKC 123;

<sup>98</sup> *ICT Ltd v Sea Containers Ltd* (1995-96) 39 NSWLR 640

<sup>99</sup> This appears to have been the view of the Australian Law Commission which in para 141 of its report (*ALRC 33, op cit*) concluded: '... differing views were expressed to the Commission about the desirability of a corporate veil provision, either confined to the identification of surrogate ships, or applying more generally. The predominant view was that a special provision in the legislation was undesirable ... [T]he fundamental consideration in the Commission's view, is the undesirability of making special provision with respect to the corporate veil in legislation dealing with admiralty jurisdiction. If questions of the liability or indebtedness of corporate groups are to be addressed this is properly done through company or insolvency law rather than in specific legislative contexts such as admiralty jurisdiction. Accordingly there should be no special provisions dealing with the corporate veil, or defining 'related' or 'associated' companies in the proposed legislation.'

leaf to cover the otherwise inexplicable is difficult to tell. One would have thought that more than twenty-five years of the associated ship jurisdiction being invoked against perfectly respectable groups of companies that are plainly not constituted through one-ship companies for any dishonest or dishonourable purpose would have caused courts to pause for reflection before repeating this tired old mantra, but there is no sign in their judgments that they have done so.

## 5 A JUSTIFICATION FOR THE ASSOCIATED SHIP ARREST

Once the grounds advanced for the introduction of the jurisdiction by way of the arrest of a true associated ship are seen to be less substantial than they possibly appeared at the time, the question inevitably arises whether there is nonetheless a justification in principle or policy for this innovation, which provides a sound reason for retaining the jurisdiction. Alternatively does one accept the Australian criticism that it is an anomalous exception to general principles of company law lacking any principled legal justification and dependent on a pragmatic one. Experience and inclination, which provide the pragmatic justification, suggest that it has been a valuable innovation that has had few detrimental side effects, unless one regards the payment or settlement of a number of otherwise irrecoverable claims as detrimental. The very few cases in which such an arrest has led to proceedings to recover damages under s 5(4) of the Act does not suggest that there has been any widespread abuse of the jurisdiction. At a practical level its retention seems desirable. This may, but does not necessarily, suggest the existence of a defensible underlying rationale for the jurisdiction, upon the simple basis that if something works there are usually sound reasons therefor capable of being reconciled with either legal policy or legal principle. The difficulty is to identify those reasons.

Part of the problem with the original explanations for the extended associated ship arrest jurisdiction is that they did not explore the fundamental reasons for the existence of companies and groups of companies. In the result they painted with too broad a brush, thereby obscuring the true significance of the corporate structures underlying fleets operated on the basis of one-ship, one company. They are too dependent upon assumptions as to the appropriate legal principle and the scope of the Arrest Convention to be entirely satisfying. There is a connection between the

Arrest Convention and the need for this jurisdiction but at the time the connection was not fully explored and articulated. This is not surprising because those engaged in discussions about the proposed Act were concerned with broader questions of the future shape of admiralty law and jurisdiction in South Africa rather than something that was then viewed as incidental.

In the various exchanges concerning the terms of the Act the most vigorous debates concerned its provisions in regard to the law to be applied in maritime cases.<sup>100</sup> The absence of debate over the concept of the associated ship arrest has already been noted<sup>101</sup> and resulted in broad and ostensibly plausible reasons being given for it without those reasons being subjected to close scrutiny. That in turn leads critics - although these have been few in number in South Africa - to make the obvious point that the jurisdiction in relation to true associated ships involves a fundamental departure from basic principles of company law that requires to be considered more generally than in the maritime context alone. It is that approach that caused the Australian Law Commission to reject suggestions that a similar jurisdiction should be introduced in Australia.<sup>102</sup> However this ignores the possibility that the particular context of maritime litigation may exacerbate a more general problem existing in the field of company law and justify special treatment. It is suggested that exploration of this possibility leads to an acceptable justification of the true associated ship arrest jurisdiction although not necessarily one that all nations will think

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<sup>100</sup> The early proposals would have enabled the courts to develop a South African maritime jurisprudence with a good deal of flexibility based on Roman Dutch law, English admiralty law and the general concept of the law of the sea. However, pressure to establish a more definite legal regime prevailed so that the ultimate compromise embodied in section 6(1) of the Act has aligned our substantive law in dealing with maritime claims substantially with that of England and Wales, with very little resort being had to Roman Dutch law or other sources. A curious feature of the subsequent jurisprudence has been the resort to section 6 in order to construe the Act itself. See for example the court's approach to determining the nature of a maritime lien in *Transol Bunker BV v m.v. 'Andrico Unity' and others* 1989 (4) SA 325 (A). This inverts the enquiry. Until a vessel has been properly arrested under the Act, which in that case required that the claimant have a maritime lien over the vessel, there is no 'matter' in respect of which a court sitting as a Colonial Court of Admiralty has jurisdiction. The question of whether a vessel can be arrested under the Act is in my view clearly not such a question. This approach contrasts markedly with the robust attitude of the Australian courts that: 'The Admiralty Act is, however, a creature of the Australian Parliament and must be construed in accordance with the laws of Australia.' *Kent v SS 'Maria Luisa' (No 2)* (2003) 130 FCR 12, para 38, 27.

<sup>101</sup> Footnote 28 *ante*.

<sup>102</sup> Footnote 92 *ante*. There is a measure of irony in the fact that when the revision of the Arrest Convention was under consideration Australia was one of the countries that supported the United Kingdom the introduction of a jurisdiction along the lines of the South African associated arrest. See Chapter 1, footnote 29, *ante*.

it appropriate to adopt and that the proper starting point is to have regard to the reasons why legal recognition was in the first place accorded to the notions of separate corporate personality and limited liability.

The company as an institution is in legal terms a relatively recent invention.<sup>103</sup> By creating an entity separate from the natural persons engaged in the business and limiting the liability of those persons a number of purposes can be achieved which are in general conducive to the promotion of investment and entrepreneurial activity. That in turn is regarded as being generally beneficial to the welfare of society as a whole in a world that espouses a capitalist free market economic system. (In a system that rejected the notion of free enterprise and private property the problem being explored would be treated as further evidence of the dysfunctional nature of capitalism.) These different purposes depend upon the company having separate legal personality and limited liability. The view is that if companies have limited liability this facilitates the raising of capital and promotes entrepreneurship by fixing at the outset the maximum liability of participants in the venture. This can widen the pool of potential investors and enable investment to be sought from persons who want no role in the activities of the enterprise but are willing to provide (or stand good for) a limited amount of capital to the business provided they do not thereby expose themselves to any risk greater than the amount of the capital they are willing to provide.<sup>104</sup> The underlying argument was originally and remains that by enabling investors to separate their other assets from those of the business and from attack by the creditors of the business or, to a lesser extent, by enabling the business to separate its assets from the assets and liabilities of its investors, the raising of capital is facilitated as the risks involved in the venture

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<sup>103</sup> Gower (6th Ed), *op. cit.*, 36-91 provides a short history. For the history in South Africa see LAWSA, Vol. 4, part 1 (First Re-Issue), paras. 2-5; Blackman et al, *op cit*, Int-4-6,. J.T. Pretorius et al, *Hahlo's South African Company Law through the Cases*, 6<sup>th</sup> Ed. (1996) 1-9 contains a number of useful background references on the development of the company as a legal institution. Png, *op cit*, 2-9 outlines the history and refers to the principal theories of corporate personality with reference to the extensive writing on this topic.

<sup>104</sup> The risks of unlimited liability had been highlighted in England by the consequences of an economic slump from 1845 to 1848 (Gower (6<sup>th</sup> Ed), *ante*, 40) and featured prominently in the debates surrounding the passage of the Limited Liability Act 18 & 19 Vict c.133. In a more modern context those risks have been highlighted by the disaster at Lloyds in the 1980's and early 1990's arising principally out of underwriting practices in respect of pollution and asbestosis claims. For a general account of that disaster see A Raphael, *Ultimate Risk*.

are clearly defined at the outset. This in turn promotes entrepreneurial activity for the general benefit of the economy and creates investment markets in which investors can participate secure in the knowledge that the financial soundness of their fellow investors is in large measure irrelevant to their investment decisions.<sup>105</sup>

Valid though these arguments may be in the context of large business entities that offer their shares to the public in order to raise capital for their business ventures, Professor Davies points out that they have little application in the context of businesses, having a limited number of participants or even only a single shareholder<sup>106</sup> that may vary greatly in the scale of their operations but will very frequently be smaller and often much smaller than public listed companies. There the advantage to be gained by incorporation is limited liability for the participants although even that may be more illusory than real where the company is financed by way of borrowings and the bank or other financial institution insists on the shareholders signing as sureties for the due performance of its obligations. In those circumstances small creditors and those who are injured by conduct for which the company is delictually liable will bear the brunt of the consequences of limited liability, whilst those who provided the finance to enable the company to conduct business in the first place are better able to protect themselves and their interests.<sup>107</sup> In the maritime context banks that finance the operations of fleets of vessels will

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<sup>105</sup> Paul Davies, *Gower and Davies' Principles of Modern Company Law*, 7th Ed (2003) 176 -180, deals with the original rationale for limited liability and stresses that in the context of England at the time this was an attractive argument as there were then many large projects contemplated that would require considerable sums by way of capital in particular the extension of the railways. Cheang and Wong, *op cit*, 39 refer to these original purposes in supporting the theory that the proper ground for disregarding the separate corporate personality of a company is that it is being used for a purpose inconsistent with the intended functions of a company in terms of the relevant legislation.

<sup>106</sup> As in the case of *Lee v Lee's Air Farming Ltd* [1960] 3 All ER 420 (PC). *Gower and Davies op cit*, 177. This refers to beneficial shareholders as for many years company legislation in various parts of the world required that a company have a minimum number of shareholders. This was commonly circumvented by having an appropriate number of nominee shareholders holding a limited number of shares. Davies, *Introduction to Company Law*, 28.

<sup>107</sup> *Gower and Davies, op cit*, 179. In Davies, *Introduction to Company Law*, 76-77 this is referred to as secured creditor opportunism. Hannigan, *op cit*, 78 writes: 'Typically, a bank will require each subsidiary company to provide security and guarantees that it will meet its own liabilities to the bank and the liabilities of any other company in the group to the bank.. These contractual devices ensure that the bank is able to ignore the separate legal entities and in effect to lend to the group and to recover from the group.'

frequently insist that they be separately owned and will secure their own lending to the operators of the fleet by way of cross-mortgages, cross-guarantees and personal guarantees from the individuals who control the enterprise. The result is that the banks can avoid or mitigate the consequences of limited liability whilst leaving the day to day creditors of the shipping enterprise to fight for payment from the proceeds of a vessel the value of which is usually considerably less than the total of the claims arising from its operations. Whilst the financial institutions claim for themselves the ability to have resort to assets beyond the one in respect of which the loan may be advanced their insistence on that asset being held separately from other assets in the group also serves to protect the lender against other creditors.

A further area of concern arising from the doctrine of separate corporate personality is its application in the area of groups of companies. As we have seen this is, at least potentially, an issue that is particularly engaged in the maritime field. If the reason for conferring the advantages of corporate personality and limited liability are those set out above it is in many instances unclear why every company in a group of companies should enjoy those advantages separately from every other company in the group. This is not to say that every instance of a group of companies arranging its commercial and economic activities through subsidiaries is unacceptable. It has been pointed out that:-

‘A company can have many varied business interests and it may be that in modern commercial times the pursuit of those interests can be most effectively carried out individually through a group of companies. There is nothing wrong in law for a company to arrange its economic or commercial activities and to allocate risks and liabilities in that process in a manner which it considers to be the most advantageous in modern competitive times ... [T]here may be a good commercial purpose for having separate companies in a group performing different functions even though the ultimate controllers would very naturally lapse into speaking of the whole group as ‘us’.’<sup>108</sup>

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<sup>108</sup> Cheang and Wong, *op cit*, 23. This was the approach of the Court of Appeal in *Adams v Cape Industries plc* [1991] 1 All ER 929 (Ch D and CA) which dealt with the case of involuntary creditors of a company forming part of a wider group of companies. Davies, *Introduction to Company Law. op cit*, 105 describes the effect of that decision in the following terms: ‘In a robust judgment the court was clear that the fact that a group of companies was in fact conducted as a single economic entity did not mean that the normal operation of the principles of separate legal personality and limited liability were to be set aside. Cape was not to be exposed to liability on the grounds that it ‘ran a single integrated mining division with little regard to corporate formalities as between members of the group’. So, the parent company could make the other members in the group dance to its tune without losing the benefits of

However, not every case involving a group of companies and a multitude of wholly owned subsidiaries can be justified on this basis. Whilst it is usually correct to say that a multi-national conglomerate operating in a variety of fields and having a number of subsidiaries each of which conducts different aspects of its business involves a wholly legitimate use of the separate corporate personality of companies, not all cases are that clearcut. In the case of all such groups the usual response of the legislature, both in South Africa and elsewhere, is to require consolidated group annual financial statements that reflect the affairs of the group as a whole.<sup>109</sup> However, this does not suffice to address the real problem. Writing in 1997, Professor Davies commented that:

‘Indeed British company law has failed, unlike German or US law, effectively to come to grips with the problems posed even by purely domestic groups of companies. We still commence with the proposition that all the companies in a group are separate legal entities, and only in the realms of tax law and financial reporting has any significant attempt been made to deal with the group as a whole. Nor ... is this an area where the Community as a whole has had any greater success.’<sup>110</sup>

The same author developed that theme in a subsequent edition of the same work<sup>111</sup>:

‘The second matter which is apparent about the rationales for limited liability, identified above, is that they work better, perhaps even assume, that the shareholders are natural persons. However, very many businesses are today carried on through a group of holding and subsidiary companies rather than through a single company. This raises the question of whether the doctrine of limited liability should apply only as between the holding company and its shareholders or also within the group i.e. between the holding group and the subsidiaries and among the subsidiary companies. In fact, the doctrine does apply within groups, a conclusion which the courts have arrived at without any deep

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limited liability as against those companies. Moreover a questionable motive did not deprive Cape of these benefits: it retained them even if ‘the purpose of the operation was in substance that Cape would have the benefit of the group’s asbestos trade in the United States, without the risk of tortious liability’. It was the court thought, a legitimate use of the group structure to bring this result about. With respect all that the judgment demonstrates is that the traditional and limited ability of courts to go behind corporate structures mandated by the legislature does not suffice to address all opportunistic uses of those structures.’

<sup>109</sup> See ss 289 and 290 of the Companies Act, 61 of 1973, as amended. Png, *op cit*, 143 points out that the metaphor of a veil is not entirely satisfactory because ‘the presence of the veil never means that the affairs of a corporation are completely concealed’

<sup>110</sup> *Gower (6<sup>th</sup> Ed) op cit*, 69-70.

<sup>111</sup> *Gower and Davies op cit*, 178-179

consideration of the matter as an inevitable consequence of the doctrine of separate legal personality. However, a rationale for limited liability has been advanced which would justify its application within groups and, to some extent, to small companies. This is the 'asset partitioning' rationale. What limited liability facilitates, it is said, is the segregation of groups of assets, between investors and the company, in the case of a single company, or as among different companies in corporate groups. Although this situation is normally presented as one which hinders the enforcement of claims by creditors, it can be argued that it works to their benefit. Just as a creditor of a company, or of one of a number of companies in a group, cannot assert its claims against that company's shareholders, individual or corporate, so also the creditors of a shareholder, individual or corporate, cannot assert their claims against that company. In other words, our first creditor obtains protection from the shareholder's creditors, in exchange for the limited liability of the company to which he or she has advanced credit, and thus may confine his monitoring efforts to the company to which he has advanced the credit and does not have to monitor the activities of whole group or of individual shareholders. Of course, the proponents of this rationale do not deny that the operation of limited liability within corporate group (*sic*) may give rise to possibilities for abuse, which the law should control, but they do argue that the application of limited liability within groups is in principle justified.'

Whatever the general merits of the suggested rationale for the recognition of separate corporate personality within groups of companies it does little to justify the situation of a shipping fleet which is operated as a single entity for the benefit of a particular individual or individuals but in which each vessel is owned by a separate company. The 'asset partitioning' that occurs in that situation serves little purpose insofar as protecting the interests of creditors is concerned. In fact quite the opposite may be true. It serves the interests of the individual who is the beneficial shareholder of the whole group and possibly facilitates one or two secured creditors, usually banks or other financial institutions, in obtaining advantages that by the nature of the enterprise cannot be available to all. In general, creditors' interests depend upon the provisions that dictate the order of priority amongst different claimants to the proceeds accruing from the sale of the particular vessel.<sup>112</sup> The effect of the 'asset partitioning' inherent in a fleet operated on the basis of a number of 'one-ship companies' is not to protect creditors but to limit the assets of the fleet against which they may pursue their claims to the particular vessel in respect of which those claims arose. Virtually the only creditors that will be able to enforce their

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<sup>112</sup> These are dealt with in s11 of the Act the broad effect of which is to subordinate 'associated ship' claims against a vessel to a relatively lowly status. See s 11(11) and *Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the m.v. 'Jade Transporter'* 1987 (2) SA 583 (A).



claims on a broader basis will be banks and similar entities whose claims are secured by fleet mortgages and cross-guarantees.

The asset partitioning theory may have merit when one is dealing with a successful group of companies that is contemplating entering into a new field posing risks for the survival of the group itself. In that situation it is appropriate to strike a balance between the interests of all stakeholders in the group - shareholders, employees, creditors and even the State, which looks to the company for tax revenue and the provision of employment and is concerned about the social security implications of business failure - and the creditors who come into existence only because of the new venture. One can there appreciate that there may be a socially useful result flowing from permitting the group to undertake the new venture whilst protecting its existing assets against claims if the venture proves unsuccessful<sup>113</sup>. However in the typical shipping group operating through one-ship companies this is not the reason for adopting this type of group corporate structure.

Structures of the type we are concerned with are not established in order to secure the broad general benefits for which separate legal personality and limited liability is conferred upon companies by company law. One-ship owning companies do not ordinarily seek investment from the general public, although there are some groups that facilitate investment by wealthy individuals, usually solicited through brokers or personal contact with those running the group, in the financing of the group operations or particular ships. They may seek finance from banks but the banks avoid the consequences of separate corporate personality and limited liability by requiring cross-collateral security across the fleet and from the natural persons who stand behind the various corporate entities. Nor is the corporate structure intended to protect the business of the one-ship company from the creditors of its shareholders. In the ordinary course of events the financial position of those individuals will depend upon the successful operation of the fleet rather than the reverse. It is difficult to think of a situation where the unrelated activities of the shareholders in a shipping company resulted in the creditors of the shareholder seeking redress

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<sup>113</sup> P Davies, *Introduction to Company Law*, *op cit*, 102-3.

against the vessel. In any event, the asset partitioning theory in that sense only holds good when there are a multiplicity of shareholders in the corporate entity. Where one is dealing with a single controlling shareholder, who runs into financial difficulty, unsatisfied creditors can always pursue the shareholder by way of sequestration proceedings and, as the shares in all the ship-owning companies are assets in that individual's estate, the corporate structure can be stripped away through the conventional processes of sequestration. This is probably true as well in any instance where the group has only one or two major controlling shareholders or a family-controlled group whose fortunes are tied up with the overall fortunes of the group so that in colloquial parlance they sink or swim together.

It is submitted that the dilemma of reconciling traditional views about companies with these difficulties can be resolved by recognising that neither separate corporate personality nor limited liability are in all circumstances such overriding legal values that they cannot be departed from in particular situations in order to give effect to other socially useful goals, such as the need to hold individuals responsible for their actions or, in the case of the true associated ship, the economically desirable purpose that people should wherever possible pay debts when they are in a financial position to do so. Where the advantages of separate corporate personality and limited liability are not in place to serve the purposes for which they were intended and are exploited for different purposes that are socially or economically undesirable, then it is legitimate for there to be intervention, whether by the courts or the legislature, to address that situation. As it is not for courts to undermine institutions that are established through the legislative process and have their foundation in law this is most usually done by way of legislation. As Devlin J wrote, 'the legislature can forge a sledgehammer capable of cracking open the corporate shell'<sup>114</sup>

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<sup>114</sup> *Bank Voor Handel en Scheepvaart v Slatford* [1951] 2 All ER 779 (QBD) 799

The need for legislative intervention is greater where the use being made of corporate personality is such as to undermine the basic principles applicable to companies because they are perceived to be exploitative of that status. Professor Davies<sup>115</sup> expresses matters thus:

‘First, the values which underlie the core features cannot be presented as overriding policy objectives which must defeat in all circumstances countervailing values. Take, for example, the doctrine of limited liability, that is, the rule that creditors’ claims are limited to the company’s assets. As we shall see ... one powerful argument in favour of limited liability is that it encourages the purchase of shares by people who do not want to get involved in the management of the company. However, it is also a doctrine which may permit, or even encourage, opportunistic behaviour on the part of the controllers of the company as against its creditors, for example, by spiriting out of the company assets which the company was represented as owning when the credit was advanced to the company. It is not in the interests of companies in general for limited liability to be used in this way, because such behaviour may make it more expensive for them to raise credit. For example, if abuse of the doctrine of limited liability were rife, banks lending to companies might be prepared to do so only at higher interest rates than would obtain if the shareholders’ liability was not limited. So, the task for company law is not simply to implement limited liability. The task is not even necessarily to balance the interests of investors and creditors, though it may come to that if no better strategy can be identified. The most challenging task is to design a set of rules which achieves the benefits of limited liability (encouraging shareholder investment) while reducing or even eliminating the occasions for opportunistic behaviour as against creditors which those rules might otherwise generate.’

It is submitted that in the situation of a fleet of ships being operated as a single trading entity with each individual vessel being separately owned by a one-ship company it is difficult to justify the grant of separate legal personality and limited liability to each company in the group by resort to any of the conventional justifications for that status. Certainly strong views to this effect were expressed by a number of delegates at the 1999 CMI Conference reviewing the Arrest Convention. Professor Davies points out that the traditional arguments in favour of limited liability ‘seem weakly applicable’ in the context of groups of companies.<sup>116</sup> As that is the case there is a general argument in favour of saying that it is appropriate to treat the use of separate corporate structures in a group as at least potentially exploitative or as an opportunistic use of the advantages of corporate personality or to take steps to prevent such use being exploited for

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<sup>115</sup> P Davies, *Introduction to Company Law*, 2004 (Clarendon Press), 33.

<sup>116</sup> P Davies, *op cit*, 108.

unacceptable purposes. That might justify separate treatment of groups of companies and possibly intervention to prevent reliance upon the conventional rules governing companies. However it is not necessary to explore the general shape and form which such intervention could take as we are here concerned with a specific rather than a general problem. The narrower issue is whether in the maritime context the problem has distinctive features that are widely apparent and susceptible to a solution.

The general problems of groups of companies are of course not specific to the maritime context. What serves to differentiate the latter from other group situations is that it takes the concept of asset partitioning to an extreme that is not ordinarily available elsewhere. In the conventional land-based business operation each subsidiary will ordinarily constitute a definable business unit that may be established wholly separately from the group. In the case of shipping groups, however, the establishment of one-ship companies is asset-based rather than operationally based. In other words the creation of the separate corporate entities is undertaken for the purpose of segregating assets rather than for the purpose of segregating operational business entities. Whilst each vessel in the fleet is separately owned by a one-ship company the operations of the fleet are conducted as a unified business operation. This is reflected in the day to day trading activities of the fleet being conducted by a separate management company, usually forming part of the same group. In such situations all activities regarding the management of the affairs of the fleet are centralised in the ship manager. It is responsible for securing employment for the vessel. The ordering of bunkers, provisions and supplies and the obtaining of crew is undertaken by the manager or through agents appointed by the manager. Insurance cover is obtained for the fleet as a whole and it will be entered as a fleet entry with its P&I Club. The manager will make all the arrangements for the maintenance of the vessels, dry-docking and repairs and the undertaking of regular surveys. No doubt in commercial negotiations the fact that the parties are dealing with a fleet of vessels is exploited to secure better terms of trade.

Where that is the case the one-ship owning company has no operational significance.<sup>117</sup> Ordinarily it does not employ anyone other than the crew of the vessel itself and all decisions concerning its business activities are taken by someone else. Very often it will not even have a bank account of its own. In many flag of convenience countries its shareholders and directors will be nominees and its record of directors' meetings and general meetings of shareholders will be purely formal in nature. The company exists solely for the purpose of owning the vessel and as an accounting entity. As a trading operation it exists only in the minds and records of its accountants.

Such a situation is almost impossible to replicate in any other form of business activity. Even in groups of companies with a rigidly hierarchical management structure, such as those that exist in the mining industry, it would be unusual to find subsidiary companies whose existence was so entirely nominal. The nearest comparable situation would be provided by special purpose vehicles set up as part of complex financial and financing structure, particularly with a view to securing tax advantages.<sup>118</sup> However, the nature of the business undertaken by a shipping fleet, involving as it does a trading activity, is fundamentally different from financing activities. If, for example, the activities of such a fleet are compared with land-based trading activities one does not in practice encounter comparable business structures. Transport companies might have separate branches in different places and operate each branch under a separate subsidiary company, but they would not operate each vehicle as a separate company.

These differences arise from the peculiar nature of the shipping industry and can properly be recognised as setting it apart from other forms of business. They have over many years led to the establishment internationally of special legal regimes governing maritime matters, some aspects of which were explored earlier. The special nature of that industry is what has enabled

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<sup>117</sup> The Belgian delegate to the conference leading to the conclusion of the 1999 Convention described the ship-owning companies as 'more or less fictitious companies' and Belgian cases summarised on the CMI website suggest that Belgian courts share that scepticism. Berlingieri, *op cit*, 583.

persons engaged in the business of shipping to exploit the advantages that flow from the one-ship company. For the reasons set out above it is suggested that the extent of asset partitioning that can be achieved by the use of one-ship companies in the context of the operation of otherwise unified fleets is considerably greater than is ordinarily the case in respect of other industries and can as such be regarded by policymakers as an exorbitant and opportunistic use of the advantages of separate corporate personality and limited liability. That in turn can legitimately attract a policy-based response from the legislature designed to curb such opportunistic use. The existence of a consistent pattern of the use of corporate personality and limited liability in groups of companies operating fleets of vessels in such a way as to prefer certain secured creditors and limit the ability of smaller and involuntary creditors to recover on their claims, whilst the beneficial owner of the group enjoys the benefits of operating their business as a single entity, is not in principle either dishonest or fraudulent, but it can nonetheless be characterised as opportunistic behaviour designed to achieve purposes other than those intended to be conferred by such separate corporate personality and limited liability. There are no indications that similar patterns of conduct are replicated in other forms of business or industry and accordingly a legislative response to this specific problem does not undermine the general law governing companies.<sup>119</sup>

The nature and form of such a legislative response is dictated by the high level of international mobility of ships. This is what has given rise over many years to the international development of legal regimes for the arrest of vessels. The purpose of such regimes is to assist

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<sup>118</sup> *Re Polly Peck International Plc* [1996] 2 All ER 433 (Ch D). Such endeavours are not always successful in obtaining the sought after advantages. See *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 2 All ER 275 (HL) and *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* 1996 (4) SA 942 (SCA).

<sup>119</sup> Staughton LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose* (No 1)[1991] 4 All ER 769 (CA) 779 remarked that: 'The creation or purchase of a subsidiary company with limited liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere.' This passage not only recognises that the use that can and is sometimes made of these structures to avoid liability for the payment of claims is opportunistic and not directed at achieving the purposes for which limited liability was intended but also highlights the fact that this is a particular issue in the context of international shipping. Interestingly Staughton LJ did not identify any other sphere where the same situation prevails and expressed it as a mere possibility.

creditors to enforce legitimate claims. What is apparent is that the international framework within which such arrests at present take place, namely the Arrest Convention, is inadequate to deal with the phenomenon of the one-ship company. The reason for that is not that this phenomenon has arisen as a device to circumvent arrest under the Convention but because the Convention is not directed at addressing the consequences that legal systems around the world attach to companies, namely the recognition of their existence as separate legal entities and the fact that they enjoy limited liability. The relevance of the Arrest Convention lies not so much in what it does but in what it does not do. What it does is provide an internationally acceptable regime for the arrest of vessels in instances where defined maritime claims lie against the owners of such vessels or their demise charterers. What it does not do is address the use of corporate personality and limited liability that enables natural persons to segregate assets that for all practical purposes are part of a single business operation in such a way as to render it more difficult for creditors of that business operation to pursue claims for the recovery of amounts due to them. In the absence of provisions that enable courts to circumvent the rules of company law that give rise to these difficulties the problems occasioned thereby must attract a legislative response, either domestically in particular countries or internationally through changes to the Arrest Convention, if they are to be addressed at all.

Whether such a legislative approach is adopted will of course depend heavily upon the weight given to different policy considerations in any particular country. In one where there are substantial ship-owning interests one would expect the policies adopted by government to be such as to promote those interests and to facilitate the acquisition and operation of ships. It is unlikely that such countries will welcome or adopt measures that enable creditors of ship-owning companies to have a broad scope for relief against other companies in a fleet or against those who stand behind such companies. They are likely to oppose any measure designed to facilitate claims against ship-owners or to make their vessels more vulnerable to arrest.<sup>120</sup> In countries that have relatively small ship-owning interests but are significant importers of goods by sea or have large

insurance markets or are otherwise more concerned about the interests of claimants than those of ship-owners, there will be pressure to have a generous jurisdiction favourable to the interests of claimants in shipping cases. These are the primary voices that will be heard in any debate over the issue and it must be recognised that in differing contexts both perspectives have their merits and principled arguments can be made for both. Whilst these are the most obvious interests the voices of those who provide finance for the acquisition of ships will need to be heard as well as those who insure both vessels and cargo. Trade unions representing crew will also have a view that will need to be taken into account. In any one jurisdiction the arguments that will prevail are ultimately not legal arguments but broader political and economic arguments. In practical terms they boil down to whether the country in question is concerned that maritime claims be paid and is willing to disturb corporate structures to achieve that end or whether it is less concerned about the payment of claims and regards the health and continuation of its ship-owning industry and related interests as of greater importance and hence is desirous of maintaining the structures that provide support to that industry in full force. Few countries are overly concerned with moral imperatives regarding the obligation to pay debts. In this field commercial pragmatism reinforced in some instances by the advantages to the *fiscus* are the ones most likely to prevail. In countries that have established a profitable business as ships registries it is unlikely that there will be any great enthusiasm for regimes that undercut or disturb their corporate activities. In a country such as South Africa, seeking to establish itself as a favourable destination for maritime litigation, the establishment of a generous and claimant-friendly arrest regime will be viewed favourably. Any debate over this issue at an international level will require that there be trade-offs between countries the precise nature of which is not necessarily foreseeable.

Internationally there is a sufficiently widely expressed concern over the widespread use of one-ship companies that it can properly be considered a matter of concern. In order to address the perceived inadequacies of the Convention as a mechanism to assist creditors in the enforcement of claims, where those claims have arisen in respect of ships owned by one-ship companies, one

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<sup>120</sup> An examination of which countries opposed international attempts to include some form of associated ship arrests in the 1999 revision of the Arrest Convention reveals that all the major ship-owning countries that had no



needs not an extension of the Arrest Convention but a fundamentally altered legal regime directed at overcoming the problems of company law that are not addressed by the Convention. That is what is provided by the true associated ship arrest jurisdiction in South Africa. It must be borne in mind that this is not simply a jurisdiction that enables the creditor to pursue assets other than those owned by its debtor. Whilst in some instances this will be the effect, as where the vessel in respect of which the claim arose is no longer available to satisfy the claim and the company itself no longer has any assets, where that is not the case the effect of invoking this jurisdiction will be to bring before the court the persons who stand behind the actual debtor. Rather than treating this as an example of piercing the corporate veil it is more appropriate to say that the true associated ship arrest is based on a disregard of separate corporate existence within groups of companies operating fleets of vessels in maritime trade. Whereas piercing the veil is usually invoked to render the members of the company liable for the actions of the company, in the case of a true associated ship arrest it is not the members of the ship-owning company who are rendered liable for the debts of the company. Rather it is the assets of other companies in the group that become vulnerable to arrest and potentially execution and even then only after the creditors of the associated ship have been satisfied. In effect the ships making up the fleet are treated as being owned in common and their strict legal ownership by the separate companies is disregarded, save where questions of priority in the distribution of a fund arising from the sale of a vessel are involved. In economic terms the group replaces the company as both debtor and owner of assets for the purposes of recovering debts although this cannot be taken too far in that it is only ships within the group that are made vulnerable to arrest for this purpose. No judgment ensues against the group or against the ship-owning companies in the absence of personal liability and for example there would be no power to execute against a bank account on a judgment *in rem* against an associated ship.

It needs to be emphasised that it is not the purpose of the true associated ship jurisdiction to render liable for claims those who have absolutely no connection with the incurring of the relevant debt. Its purpose is to go behind the corporate curtain and to identify those who are the real beneficiaries of the company that owns the vessel in respect of which the claim arises and the

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countervailing interests were opposed to this.

commercial operations of that vessel. Those are the persons who benefit from this use of separate corporate personality and the jurisdiction is directed not at rendering those individuals personally liable but at depriving them of that opportunistic advantage. The issue for present purposes is whether it is possible to articulate a principled justification for the true associated ship arrest and its underlying policy of disregarding the asset partitioning that occurs in shipping groups in consequence of the use of one-ship companies. The answer must lie in the policy choices of different countries. Once this is recognised it becomes a matter of balancing the interests of shipowners in such asset partitioning against the interests of creditors in having an extended ability to secure payment of their claims.

In that balancing exercise the argument in favour of a more generous arrest regime has as its starting point the proposition that in general the law and economics should favour and facilitate the payment of claims rather than their non-payment. Market economies are based upon the principle that promises that are seriously made in the course of the conduct of business should be fulfilled. This is what enables business to operate. Responsibility for their fulfilment must ultimately rest with the natural persons who benefit from those business activities. Foremost among the promises that are made in the daily exchanges of commercial life is that payment will be made in return for the provision of goods and services. No legal system operating in the context of a market economy fails to provide for mechanisms for enforcing these promises and extracting penalties (usually by way of damages) for non-performance. By recognising corporate personality and limited liability the law enables the beneficiaries of commercial activities to avoid those consequences insofar as they go beyond the limits of their liability as embodied in the founding documents of the company. It does so for sound reasons namely that in general the results are advantageous to society as a whole because of the economic benefits that flow from the corporate form as a means of undertaking business. Where the advantages to the beneficial shareholders are regarded as exorbitant in relation to the societal benefits attributable to separate corporate personality and limited liability legislatures will intervene.

The other side of the balancing exercise is to examine the extent to which the infringement of the basic principles of company law in this situation may undermine those principles in such a

way as to pose a threat to their generally recognised usefulness. In order to understand this it is necessary to examine the situations in which the true associated ship jurisdiction will be invoked. Firstly it has no bearing on any group of shipping companies that secures that all the companies in the group pay their debts. As such it does not pose any obstacle to shipowners making use of this type of corporate structure for reasons relating to cost effectiveness, taking advantage of beneficial tax regimes or the like. The shipowner who has reasons other than the avoidance of creditors for operating under such a regime remains entitled to do so and the right to do so will be recognised in all courts including those of South Africa. In many instances the jurisdiction is invoked solely for the purpose of establishing jurisdiction and obtaining security for a claim or even solely for the latter purpose. In neither event does the invocation of the jurisdiction destroy the corporate structure. All that it requires is for the actual debtor, that is the company that owns the vessel in respect of which the claim arose, to provide the security and defend the claim. As security is usually provided by the P & I Club with which the entire fleet is entered the risk can be satisfactorily allocated within the group without disrupting the overall corporate structure.

Where the group of companies is deliberately using the corporate structure of one-ship companies in order to avoid paying debts, for example, by operating the vessels in jurisdictions where they are less likely to be susceptible to arrest at the instance of unpaid creditors, it is submitted that this use by the group and its beneficial shareholders of separate corporate personality and limited liability is self-evidently opportunistic and unacceptable. Similarly if a vessel in respect of which claims have arisen has been disposed of so that it is unavailable for the purpose of securing jurisdiction by arrest or to be attached and sold in discharge of legitimate claims and both the legal and the beneficial owners have failed to make arrangements to meet legitimate claims arising in respect of the operations of that vessel that is conduct that is commercially unacceptable and not warranted by any legitimate purpose linked to the concepts of separate legal personality or limited liability. Equally if the vessel has become a total loss and the proceeds of the insurance are held elsewhere within the group or placed in the banking account of the holding company or the managers - it has already been noted that many one-ship companies will not have their own banking account - creditors may be left with an empty shell to sue, with neither a vessel nor the proceeds of the insurance over the vessel available to pay legitimate

claims. Where those claims include personal injury or dependants' claims, both instances of involuntary claimants, the exorbitant nature of the use to which the beneficial shareholders have put the benefits of separate legal personality and limited liability is apparent. No argument can be advanced that such persons have submitted to the risk of non-recovery arising from the fragmentation of corporate structures and the separation of assets into separate companies.

It may be argued that these results also occur in land-based commercial operations and accordingly that the maritime world does not provide a special case deserving of special treatment. However in land-based operations there are commercial and practical restraints that limit the extent to which trade can be conducted on this fragmented basis insofar as the ownership of assets is concerned. One is not concerned with a situation where the available assets are insufficient but with a situation where available assets can be sequestered and insulated from attachment in payment of debts incurred in relation to other assets in the group. In the field of international shipping, because of the nature of the operations and the fact that the principal business asset of any ship owning company is the vessel itself, which is capable of being redeployed to almost anywhere else in the world at short notice, the ability of shipowners to exploit the corporate form in this fashion is far greater. In fact it is difficult to think of any other industry that operates on this basis.<sup>121</sup> Even assuming that there are one or two other industries that are capable of exploiting corporate form in this way and in fact do so, it is suggested that this rather provides a reason for legislative interference in relation to those industries to prevent like abuses rather than an argument against the true associated ship jurisdiction in maritime matters.

One argument against the jurisdiction that may require more serious attention arises in the case of a shipping line that has fallen upon difficult times and is seeking to restructure its operations by disposing of vessels that cannot be operated profitably. In that case the effect of the availability of the true associated ship jurisdiction may hamper reconstruction of the group if it is intended to trade the remaining vessels to South Africa or generally if the proponents of change along the lines of the South African example have their way. The reason is that it will be difficult

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<sup>121</sup> Possibly the airline industry but that operates under an international convention governing liability that is distinct from ownership of assets so it is not entirely comparable

for the group to protect the remaining vessels from arrest in respect of debts incurred in relation to the vessels being disposed of. However that problem is less likely to occur than one where the entire group ceases to be viable and what occurs is an endeavour by the beneficial shareholders to salvage something from the wreck of the group at the expense of some of the creditors. The true associated ship jurisdiction has been invoked in a number of such situations to provide some protection to creditors and secure a more equitable realisation of assets for the benefit of all creditors than would otherwise be the case. Also there is nothing in the existence of this particular jurisdiction that precludes the group from entering into a conventional compromise or scheme of arrangement or debt moratorium with its creditors to enable it to restructure its affairs and survive any temporary crisis.

It is important to note that the existence of the jurisdiction does not give an advantage to creditors, whose claims have arisen in respect of vessel A at the expense of creditors whose claims have arisen in respect of vessel B, because in any situation of competing claims against the proceeds of the sale of a vessel the direct claims against that vessel are always preferred to the associated ship claims.<sup>122</sup> Hence the effect of the jurisdiction is not to advantage one group of creditors at the expense of others. This illustrates the fact that the remedy is reasonably narrowly tailored to the problem that is being addressed namely the exorbitant use of the benefits of incorporation to the detriment of creditors of a commercial enterprise that is operated as a single entity for the benefit of the beneficial shareholders thereof, but which seeks to exploit the advantages of separate incorporation of the ship-owning companies when it comes to meeting the claims of creditors. The operation of the jurisdiction is only triggered in that situation and it otherwise leaves shipowners to enjoy the benefits of incorporation in the operation of their businesses. It is inadequate as a criticism of the jurisdiction to say that it undermines the essential nature of companies. Those benefits remain available to shipowners provided they are not exploited for the purpose of avoiding obligations incurred in the process of operating the ships in question.

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<sup>122</sup> Such claims fall under s 11(4)(f) of the Act. *Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV 'Jade Transporter'* 1987 (2) SA 583 (A).

In those circumstances it is submitted that the true associated ship jurisdiction represents a legitimate legislative response to a perceived exorbitant and opportunistic use of the benefits of corporate form.<sup>123</sup> It undoubtedly is a response that favours the creditor against the ship-owner at the level of fundamental policy and is accordingly one that is unlikely to appeal to countries whose economies have a significant ship-owning industry. Beyond doubt there are substantial arguments in favour of addressing the problems posed by the widespread existence of one-ship owning companies in this way. It may be argued that the reasons for so contending involve a departure from pure legal principle into the realms of economics and as one English judge said 'we are not concerned with economics but with law.'<sup>124</sup> However there are two responses to this. The first is that corporate form is itself a creation of legislation in response to economic forces, not a construct of basic legal principle that underlies our (or any other) legal system. What the legislature has created and given legal status and recognition to, the legislature can also undo. The issue is not in that sense one of legal principle but one of the appropriateness of the policy choices of the legislature. The second response is that the purpose of creating corporate form is grounded in the perceived economic advantages flowing from the entrepreneurial use of that form. Where those advantages are not being secured or are being distorted because of the use to which corporate form is being put legislative intervention is a proper response to restore a proper economic balance. At the end of the day the proper workings of international maritime trade may be better served by putting in place systems that encourage and support the payment of debts rather than systems that enable participants to avoid their lawful obligations. Whilst not articulated in those terms at the time of the inception of the associated ship jurisdiction it seems

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<sup>123</sup> Professor Berlingieri in a recent article which came to my notice after this was first written appears to think along the same lines. He wrote: 'Maritime law is an area of the law that has always enjoyed a relative degree of autonomy from the general law. Suffice it to mention limitation of liability and general average. If it is in the interest of maritime trade to adopt specialised rules, this should be done. But perhaps it is not entirely correct to state that this is a problem that involves general principles of corporate law. The problem of single ship companies is a purely maritime problem, and may deserve an *ad hoc* regulation, irrespective of the solution of the general problem of piercing the corporate veil.' F Berlingieri, *The 1952 Arrest Convention revisited*, [2005] LMCLQ 327, 336.

<sup>124</sup> Lord Justice Robert Goff (as he then was) in *Bank of Tokyo Ltd v Karoon and another* [1986] 3 All ER 468 (CA) 486e-f. The statement was made in the context of an argument regarding piercing the corporate veil and the judge said: 'Counsel suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.'

probable that those sentiments were what underlay it and resulted in its acceptance. It is submitted that they provide a proper basis for it as an institution in South Africa founded in legal principle and that it would be desirable for this to be recognised by our courts in cases involving the associated ship arrest rather than a formulaic repetition of the pejorative expressions that have hitherto found expression in their judgments.

Whether other countries will adopt the same or similar measures or whether they will obtain wider purchase on the world stage is not within my purview although inevitably the South African experience will provide an example of how such a measure can work in practice. That makes it more important still that the South African courts should seek to articulate a principled basis for the associated ship arrest as their reasoning can then be the subject of scrutiny on the international stage. The difficulty in arriving at an internationally acceptable approach is apparent from the debates that took place at the CMI Conference on the revision of the Arrest Convention in 1999.<sup>125</sup> A fairly clear distinction emerged between those countries that have a high concentration of ship-owning interests and are accordingly reluctant to expose those interests to a more extensive regime in relation to the arrest of ships and those whose interests lie predominantly on the trading side of the maritime equation, where the ability to arrest vessels and enforce claims may be taken to have a higher priority. Once the availability of the institution is a matter of policy rather than intrinsic legal principle these considerations come to the fore and it is difficult to see on what basis they can be reconciled. No trade-offs are immediately apparent that would enable the gap between these interests to be bridged and unless those can be found it seems unlikely that a jurisdiction akin to the South African associated ship jurisdiction will win international adoption. As to the countries that would like to pursue that route they will, for the reasons already discussed above in considering the Arrest Convention in relation to South Africa, probably only be able to do so by renouncing that Convention. To forego a uniform regime so hardly won over such a long period is not something that any country will undertake lightly. In

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<sup>125</sup> The United Kingdom delegation, with the support of the Netherlands, Belgium, Japan, Canada, Australia, France and the CISL proposed 'associated ship' arrest provisions modelled on the South African provisions. F Berlingieri *Arrest of Ships* 4<sup>th</sup> Ed., (2006) 576 and 580. See the Report of the United Nations/International Maritime Organisation Diplomatic Conference on Arrest of Ships, GE 99-52433 (19/7/99), Chap II, paras 8 and 12.

the result it appears that South Africa may continue to walk this road alone for some time to come.



## CHAPTER 5

### THE EARLY DEVELOPMENT OF THE ASSOCIATED SHIP JURISDICTION

#### 1 INTRODUCTION

The Act was not an attempt to codify the maritime law of South Africa. As was noted in the course of the work of the South African Law Commission that task was initially contemplated, but would have required a far more extensive process than could then be undertaken and would not have addressed the immediate problems arising from the existing regime with the requisite degree of urgency.<sup>1</sup> Accordingly the general scope of the Act is limited. The jurisdictional confusion between the court sitting as a Colonial Court of Admiralty and the court exercising its parochial jurisdiction was addressed by the expedient of transferring the old admiralty jurisdiction to the Supreme Court of South Africa<sup>2</sup> whilst extending the range and scope of that jurisdiction. This was achieved in two ways. Firstly there was a considerable

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<sup>1</sup> In an address to the annual general meeting of the MLA on the 29<sup>th</sup> September 1978, Mr. Shaw QC noted that the terms of his appointment were to 'investigate and draft modernised rules for the Admiralty Courts and Procedure' He added: 'Now the first thing that becomes perfectly obvious to anyone who has anything to do with this matter is that modernised rules are going to get us nowhere because the law itself is not only antiquated (but) difficult to find and contradictory between the two main maritime provinces, and therefore most of those rules will be, if they are going to do any good, *ultra vires*. Therefore in a fit of what I am beginning to feel is rash and boyish enthusiasm, I suggested to the South African Law Commission that what was really required was a code of maritime law and that we should try to take the step of putting into one statute what we regard as necessary for the statute ...' However, having said that, he went on: 'I believe therefore that if we apply ourselves sufficiently to the task, it is possible to produce a statute which will comprehensively deal with the rules and procedures relating to the Admiralty Law.' In the Report on the review of the law of Admiralty of the South African Law Commission paragraph 6.1 notes that: 'If it could be done, obviously the best method of reform would be to enact a complete code of admiralty law that would apply to all maritime matters. Clearly, however, the preparation of any such code would take many years. Reform with regard to jurisdiction and procedure is urgently required and, in those circumstances, the postponement of reform until a complete maritime code has been drawn up cannot be regarded as a practical course.' The problems inherent in any attempt at codification of a system of law were dealt with by Lord Halsbury in his introduction to the First Edition of *Halsbury's Laws of England* reprinted in *Halsbury's Laws of England: Centenary Essays 2007*, xxi and xxvi and appears to have been shared by his distinguished successor Lord Mackay of Clashfern in his own contribution to that volume from xxvii.

<sup>2</sup> As the High Court was then known.

extension of the type of claim that qualified as maritime claims.<sup>3</sup> Secondly the existing limitations in regard to parties and the place where a claim arose were removed.

The complex problems arising from the fact that in the then Cape Province the English law applied in admiralty cases, whilst in Natal there was a potential conflict between English admiralty law and Roman Dutch law depending upon which jurisdiction was invoked, as well as the fact that in both areas the law was outdated, was ultimately resolved by a compromise. As with most compromises the ideal of a clear statement of the law of admiralty fell by the wayside in the process of compromise.<sup>4</sup> The compromise in effect preserved two streams of law. With regard to matters in respect of which a court of admiralty in South Africa, sitting in the exercising of its jurisdiction under the Colonial Courts of Admiralty Act, had jurisdiction immediately before the commencement of the Act, the law is said to be that which the High Court of Justice of the United Kingdom<sup>5</sup> would have applied at the date of commencement of the Act. In all other matters Roman Dutch law was to apply. The effect of this in many cases was to update the law applied in admiralty matters in South Africa by ninety years. The result may be a need in some cases to research the more arcane corners of the old jurisdiction in order to apply the modern law

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<sup>3</sup> This is reflected in the long title of the Act which records that it is an Act: 'To provide for the vesting of powers of the Admiralty Courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa, and for the extension of those powers ...' The claims included are by and large taken from the list of claims in the Arrest Convention. See paragraph 7.1 of the Report.

<sup>4</sup> In the same address where he confessed to a 'rash and boyish enthusiasm' Mr. Shaw said: 'What I have in mind is try to lay down in one statute, first of all obviously the law that should be applied. Obviously I think that we must proceed on the basis that we ought to incorporate in the statute the results of many of the conventions, treaties which have been entered into, to which South Africa is not in many cases a party. I don't see any reason why the rules which have been laid down in those conventions should not be incorporated into the statute on the basis that they must form part of the law and can be readily amended if the convention itself is amended.' Some at least of these ambitions were subsequently realised with the passage of the Carriage by Goods by Sea Act 1 of 1986.

<sup>5</sup> It is accepted that this refers to the High Court of Justice of England and Wales. Shaw, *Admiralty Jurisdiction and Practice in South Africa*, 73; *Brady-Hamilton Stevedore Co and others v mv Kalantiao* 1987 (4) SA 250 (D) 253D-E; *MV Stella Tingas: Owners of mv Stella Tingas v mv Atlantica and another (Transnet Ltd t/a Portnet and another, third parties)* 2002 (1) SA 647 (D); *MV Stella Tingas: Transnet ltd t/a Portnet v Owners of the mv Stella Tingas and another* 2003 (2) SA 473 (SCA) 479H; *Swire Pacific Offshore Services (Pte) Ltd v MV 'Roxana Bank' and another* 2005 (2) SA 65 (SCA), para 8, 70.

thereto.<sup>6</sup> Although this compromise was hotly debated prior to the Act's commencement it has by and large caused very few problems. The compromise was subject to criticism at the time of its enactment<sup>7</sup> and no doubt those with a taste for academic ingenuity are able to devise situations where it could potentially give rise to substantial legal difficulties. There is an ongoing debate within the ranks of the Maritime Law Association spurred by some who would like to see these provisions amended and amendments were prepared for debate at the annual general meeting in 2007, but at present there is little indication that this will result in any change to the present position. The absence of any significant problems identified in the cases reported in the law reports suggests that the compromise has worked reasonably well. A more significant problem lies in the too ready resort to English law to construe the Act itself.<sup>8</sup>

The balance of the Act is devoted to providing 'the framework within which maritime disputes are brought to court and decided, and whereby claims are ultimately satisfied'.<sup>9</sup> To this end it provides for two forms of procedure, namely an action *in personam*<sup>10</sup> and an action *in rem*,<sup>11</sup> both of which are available for the enforcement of any maritime claim, subject to one or

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<sup>6</sup> An example of this is provided by the judgment in *Weissglass N.O. v Savonnerie Establishment* 1992 (3) SA 928 (A). The court's caution in approaching its task is reflected in its unwillingness (at p 942G) to read the word 'bankers' as a typographical error for 'bunkers' in considering a document setting out a list of expenses for a vessel!

<sup>7</sup> H. Booysen 'South Africa's New Admiralty Act: A Maritime Disaster?' (1984) 6 Modern Business Law 75 84, where the criticism is primarily a constitutional and political one on the basis that: 'The incorporation by one independent State of another's legal system with which no constitutional links, apart from cool diplomatic relations, any longer exist, is not only an extraordinary step but also reflects unfavourably on a State's sovereignty and its Parliamentary, judicial and administrative ability to develop its own laws.'

<sup>8</sup> The criticism that the courts have been too ready to have recourse to English law in order to resolve difficult issues is founded in cases such as those dealing with maritime liens or the nature of the action *in rem*. This had the curious result in dealing with the statutory concept of a maritime lien that the court, when faced with the question whether it had jurisdiction in an action *in rem*, applied section 6(1)(a) and the English law in order to determine what the expression 'maritime lien' meant in the Act. *Transol Bunker BV v m.v. 'Andrico Unity' and another* 1989 (4) SA 325 (A). See Chap. 4, fn 100, *ante*.

<sup>9</sup> D B Friedman, 'Maritime Law in the Courts after 1 November 1983' 1986 SALJ 678.

<sup>10</sup> s3(1) of the Act provides : 'Subject to the provisions of this Act any maritime claim may be enforced by an action *in personam*.'

<sup>11</sup> s3(4) of the Act provided that : 'Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* : (a) if the

two exceptions arising from the particular nature of the action *in rem*. The apparent difference between the two that immediately appears is that the former is directed at a natural or juristic person whilst the latter is outwardly directed at property, usually a ship, but also possibly its equipment, furniture, stores or bunkers, cargo or freight.<sup>12</sup> However, save in the case of some claims giving rise to a maritime lien, if one goes behind the property arrested in an action *in rem* to the cause of action in most cases the party liable for the claim is also the owner of that property.<sup>13</sup> That is reinforced by the second circumstance justifying an arrest *in rem* namely that the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.<sup>14</sup> In that case the property could equally be attached *ad fundandam et confirmandam jurisdictionem*.<sup>15</sup> From a reading of the sections providing for the two forms of procedure the only clear instance where the *in rem* jurisdiction would be more

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claimant has a maritime lien over the property to be arrested; or (b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.’ In *Great River Shipping Co v Sunnyface Marine Ltd* 1994 (1) SA 65 (C) it was held that this section is not definitive of all the circumstances in which an action *in rem* can be instituted.

<sup>12</sup> Containers and a fund in court arising from a sale in terms of section 9 of the Act were added to the original list of property that could be arrested in an action *in rem* by way of the amendments effected by the Admiralty Jurisdiction Regulation Amendment Act, 87 of 1992. Whether it can be said from the outward appearance of the action *in rem* that it follows that property and not a person is thereby brought before the court is debatable. This proposition was asserted by Conradie J (as he then was) in *The m.v. Zlatini Piasatzi : Frozen Food International Limited v Kudu Holdings (Pty) Limited and others* 1997 (2) SA 569 (C) and followed by Knoll AJ (as she then was) in *m.v. Rizcun Trader (3); Manley Appledore Shipping Limited v m.v. Rizcun Trader* 1999 (3) SA 966 (C) 972A-B. However, there is no indication that the point was argued in the former case and the apparent adoption of the American personification theory can hardly be regarded as definitive. The point had been left open by Milne JP in *Euromarine International of Mauren v The Ship ‘Berg’ and others* 1984 (4) SA 647 (N) 654G-655A. As the discussion of the theory regarding the nature of the action *in rem* in chapter 11 demonstrates the simple personification theory that holds that it is property and not the persons having an interest in that property who are brought before the court by way of an action *in rem* is highly contestable.

<sup>13</sup> *The Parlement Belge* (1880) 5 PD 197 (CA); 4 Asp MLC 234, 245.

<sup>14</sup> It is intriguing that the expression used in s3(4)(b) of the Act is ‘cause of action’ rather than ‘maritime claim’. That expression is narrower and more technical than the concept of a claim as emerges from cases such as *Sentrachem Limited v Prinsloo* 1997 (2) SA 1 (A) 15B-16D; *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) 212G. There is no apparent reason for the use of the narrower expression and it is submitted that no significance should be attached thereto.

<sup>15</sup> s3(2)(b) of the Act read with s2(1) thereof, the effect of which was to abolish in maritime matters the common law limitation on such an attachment that it is only available at the instance of a *peregrinus* if the contract giving rise to the claim was concluded or fell to be performed in the area of jurisdiction of the court or if the delict was committed or the cause of action otherwise arose within the area of jurisdiction of that court. *Maritime & Industrial Services Limited v Marcierta Compània Naviera SA* 1969 (3) SA 28 (D).

extensive than the *in personam* jurisdiction is in the case of a claimant having a maritime lien in circumstances where the owner of the vessel is not the party against whom the underlying claim lies.<sup>16</sup>

## 2 THE ORIGINAL ASSOCIATED SHIP PROVISIONS

The provisions relating to the establishment of jurisdiction in an action *in rem* by way of arrest of an associated ship fall to be considered against that background. In their original form these appeared in section 3(6) and 3(7) of the Act which read as follows:-

‘6 Subject to the provisions of subsection (9) an action *in rem*, other than such an action in respect of a maritime claim contemplated in paragraph (a), (b) or (c) of the definition of ‘maritime claim’, may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

7(a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose:-

(i) owned by the person who was the owner of the ship concerned at the time when the maritime claim arose; or

(ii) owned by a company in which the shares, when the maritime claim arose, were controlled or owned by a person who then controlled or owned the shares in the company which owned the ship concerned.

(b) For the purposes of paragraph (a):-

(i) ships shall be deemed to be owned by the same persons if all the shares in the ships are owned by the same persons;

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.

(c) If a charterer or sub-charterer of a ship by demise, and not the owner thereof is alleged to be liable in respect of a maritime claim the charterer or sub-charterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner.’

The scope of the old admiralty jurisdiction as well as the jurisdiction *in personam* had already been extended by way of the significant increase in the number and type of claims that now fell within the revised jurisdiction. Now the jurisdiction *in rem* was further extended by the introduction of the notion of an action *in rem* being instituted by the arrest of what was termed an

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<sup>16</sup> S 3(4)(a) in a situation where the owner of the vessel would not, apart from the lien, be liable *in personam* in respect of the maritime claim in question. Other than that relatively narrow case the jurisdiction *in rem* and the

‘associated ship’ instead of the ship in respect of which the claim had arisen. An examination of this expression as defined in section 3(7) reveals that two different situations are contemplated.

The first situation as set out in section 3(7)(a) is the ‘sister ship’ arrest contemplated by the Arrest Convention. This is where not only the ship in respect of which the claim arose<sup>17</sup> but also another ship owned by the same owner is liable to arrest in order to institute an action *in rem*<sup>18</sup>. It matters not whether the owner is in fact the same person, whether individual or juristic, or a number of persons provided those persons own both vessels. The reference to ‘shares’ in a ship harks back to the days before companies when groups of investors would jointly own a vessel in defined shares an historical reference that continues to this day in the world’s ships registries. The deeming provision in section 3(7)(b)(i) replicates article 3.2 of the Convention and the effect is that in any case where a ship is owned in different shares by more than one person another ship will be an associated ship in relation thereto provided it is owned by the same persons irrespective of whether the shares in which they own the second ship are different from those in which they own the first. It is necessary that as a whole it is the same persons otherwise there is no association. The introduction of one more person or the exclusion of one defeats the association. However the fact that almost all ships today are owned by corporate bodies so that the interests of the natural persons who invest in that vessel will be determined not by their shares in the ship itself but by their respective interests in the corporate body that owns the vessel renders this provision largely academic. Indeed the history of the past twenty-five years reveals that sister ship arrests are not a practical area of controversy.<sup>19</sup>

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jurisdiction *in personam* overlap.

<sup>17</sup> Commonly called ‘the ship concerned’ an expression that will be used hereafter.

<sup>18</sup> s3(6) says that an action *in rem* can be ‘brought’ by the arrest of an associated ship whilst s3(5) speaks of an action being ‘instituted’. It is not apparent that there is any difference intended as a result of this change of wording.

<sup>19</sup> There are no reported cases dealing with sister ship arrests and none of the large body of unreported judgments circulated by the MLA or reported in private sets of reports of maritime cases deal with them. Whilst certain national fleets may be operated in this fashion it is relatively rare

Section 3(7)(b) is the provision that introduced the true associated ship. Given the nature of the concerns that underlay its introduction the language of the section was and remains pertinently directed at fleets of vessels in which all the ships are owned by single ship companies and where either ownership or control of the shares of those companies lies with a particular person. The person exercising such ownership or control may be either a natural person or itself a company or other corporate body.<sup>20</sup> However, this does not affect the central principle which is that where a person owns or controls the shares in a number of single ship companies all of the vessels owned by those companies will be liable to be arrested in respect of the debts incurred in respect of any one of them. In that paradigm situation the Act generally achieved its purpose although, as will be seen below, on the original language there were issues regarding the timing of the association and whether it was the company or its shares that had to be the subject of ownership or control in determining whether any association existed.

Both the sister ship provisions of section 3(7)(a)(i) and the true associated ship provisions of section 3(7)(a)(ii) were subject to extension in relation to a situation where the maritime claim lay against the demise charterer of the vessel and not against its owner. The deeming provision in section 3(7)(c) of the Act had the effect of expanding the scope of the jurisdiction to enable an associated ship arrest to take place where the person originally liable for the debt was not the owner of the ship concerned but only the charterer or sub-charterer by demise of the vessel in respect of which the claim arose. The extension was not an extensive one<sup>21</sup> and was consistent with the principle identified as underlying the associated ship provisions generally namely that if a claim arose in respect of a particular vessel then other vessels owned by the person liable in respect of that claim or owned by companies the shares of which were owned or controlled by the person who owned or controlled the shares of the company owning the ship concerned should be liable to be arrested in an action *in rem* to recover that claim. Where the person identified as being liable in respect of the maritime claim was the demise charterer and not the owner of the ship concerned, which excluded the case of a maritime lien, no maritime claim could be being

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<sup>20</sup> See the definition of 'person' in section 2 of the Interpretation Act 33 of 1957.

pursued against the ship concerned. Accordingly it would be impermissible for there to be an arrest of another vessel ‘instead’ of the ship concerned. The presumption overcame this in the case of a demise charterer by deeming the demise charterer to be the owner of the ship concerned. The deeming was absolute and irrebuttable.<sup>22</sup> Whilst it did not say so expressly the deeming was clearly operative at the time that the maritime claim arose because that was the time at which ownership of the ship concerned was relevant for the purposes of association.

The presumption was an adaptation of the provisions of article 3.4 of the Arrest Convention, which permitted both the demise chartered vessel and any other vessel owned by the demise charterer to be arrested.<sup>23</sup> It appears that in drafting the Act and referring to the ‘owner’ of a vessel without defining that expression attention was paid to views in other jurisdictions that for certain purposes equated the demise charterer with the owner of the vessel.<sup>24</sup> The original approach had been to exclude the possibility of the demise charterer being regarded as owner because the 1979 memorandum<sup>25</sup> reflects an intention to incorporate the decision in *I Congreso de Partido*<sup>26</sup>. The initial draft that accompanied that memorandum in 1979 contained the following provision:

‘(4)(a) Ships shall be deemed to be in the same ownership when all the shares in a ship are owned by the same person or persons.

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<sup>21</sup> The current deeming provision relating to charterparties is far more extensive.

<sup>22</sup> *Chotabhai v Union Government (Minister of Justice) and Another* 1911 AD 13, 33 - 4; *S v Rosenthal* 1980 (1) SA 65 (A) 76

<sup>23</sup> Shaw, *op cit*, 40 where the point is made that the English provisions contained in the Supreme Court Act 1981 (4&5 Eliz 2 Cap 46) permitted the arrest of the ship concerned where the claim lay against its charterer and such charter was a charter by demise.

<sup>24</sup> Thus in *Sir John Jackson Ltd v SS Blanche (Owners), The Hopper No 66* [1908] AC 126 it was held that for the purpose of limitation under sections 502 and 503 of the Merchant Shipping Act 1894 a demise charterer is encompassed by the words ‘The owner of a British sea-going ship or share therein’. See also *I Congreso de Partido* [1978] 1 All ER 1169 (QBD) 1200-3; Shaw, *op cit*, 33.

<sup>25</sup> See Appendix 1.

<sup>26</sup> *I Congreso de Partido* [1978] 1 All ER 1169 (QBD) 1200-3; (1977) 1 Lloyd’s Law Reports 536, 561-2



- (b) A person having beneficial ownership of a ship or a share in a ship shall be deemed to be the owner of such ship or share notwithstanding that he is not registered as the owner.
- (c) Owner' shall not include a charterer who has taken the ship on a charter by demise.'

This express exclusion in relation to the demise charterer survived in the next two drafts of the Act but in the final draft prior to the publication of the Law Commission Report the position was changed and a provision substantially similar to section 3(7)(c) in its original form replaced it. Unfortunately there is no explanatory memorandum that throws light on the reason for this change. One can only speculate that it was thought appropriate to incorporate some provision that would enable the associated ship arrest provisions to be used against a demise charterer, itself liable for a maritime claim, if that person either owned another vessel or owned or controlled the shares in a company that owned another vessel. It is perhaps important to stress that the deeming provision does not enable the vessel in respect of which the claim arose and the demise charterer incurred the debt to be arrested. Its sole purpose is to enable an action *in rem* to be pursued against a vessel owned by the demise charterer or a company the shares in which were owned or controlled by the demise charterer, when that would otherwise not have been possible.<sup>27</sup> At one level therefore it did not go as far as the Arrest Convention in that it did not permit the demise chartered vessel to be arrested for the debt of the demise charterer. At another it went much further in subjecting vessels not owned by the demise charterer to be arrested.

### 3 **THE BERG:**

The novelty of the true associated ship arrest provisions<sup>28</sup> was such that it was inevitable that its invocation would generate litigation raising complex questions concerning the new legal

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<sup>27</sup> In other words the purpose of the provision is to enable the claimant creditor to pursue assets the beneficial ownership of which lies with its debtor. In *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D) 216H-I Leon J quoted from an article by Hazelwood '*Gaps in the Action in Rem*' (1982) 2 LCMLQ 20, 210 where the author said of the corresponding English provision that it: '... will not permit the arrest of a ship which is merely possessed or controlled by a wrongdoer, no matter how complete may be that possession or control. This is eminently proper. Were it otherwise an innocent beneficial owner could be deprived of his vessel in answer to the wrongs of the vessel's charterer.'

<sup>28</sup> Professor H Booysen in *South Africa's New Admiralty Act 'A Maritime Disaster?'* 1984 MBL 75, 83 refers to it as 'a revolutionary idea'.

dispensation. Perhaps the only surprise lay in how quickly that occurred..A mere five weeks after the Act came into force<sup>29</sup> an application was brought<sup>30</sup> for the arrest of the *Berg*, a vessel owned by a South African company, in order to furnish security for an arbitration in London. The validity of the arrest was challenged and the resulting arguments concerning the applicability of the security arrest provisions of the Act and what may broadly be termed the possible retrospective operation of the Act's provisions are illuminating as to the nature of the associated ship arrest provisions and warrant close examination. The matter was initially referred<sup>31</sup> for decision by a Full Court of the Natal Provincial Division and was subsequently taken on appeal to the Appellate Division.<sup>32</sup> The effect of the two judgments is analysed below.

As always with the consideration of any judgment it is helpful to deal at the outset with the facts.<sup>33</sup> The claimant (*Euromarine*) had time chartered a vessel called the *Pericles* from its owners, the second respondents in the application. On the 24<sup>th</sup> December 1978 and during the subsistence of that charterparty an explosion occurred on board the *Pericles*, which was then berthed in Durban harbour. The explosion, which the claimant alleged was due to the unseaworthiness of the *Pericles* in breach of the obligations of its owners under the charterparty, caused the claimant to suffer substantial damages. It was seeking to recover these from the owners of the *Pericles* in arbitration proceedings in London. Those proceedings had commenced

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<sup>29</sup> 1<sup>st</sup> November 1983

<sup>30</sup> Under s 5(3) of the Act

<sup>31</sup> Under s 13(1)(b) of the Supreme Court Act, 59 of 1959. The same procedure had been adopted in the case of *Katagum Wholesale Commodities Company Limited v The m.v. Paz* 1984 (3) SA 271 (N). Hare, *Shipping Law and Admiralty Jurisdiction in South Africa*, 94, footnote 116 is wrong to suggest that there was a 'judgment *a quo*' in this latter case. To go on to describe this non-existent judgment as 'the low watermark' of the parochial views of some judges in the early days of the Act is likewise wrong, although the concurring judgment of Didcott J might be so described. See Chapter 1, footnote 19, *ante*.

<sup>32</sup> The decision by the Full Court is reported as *Euromarine International of Mauren v The Ship Berg and others* 1984 (4) SA 647 (N) and that of the Appellate Division as *Euromarine International of Mauren v The Ship Berg and others* 1986 (2) SA 700 (A). For convenience the two judgments will hereafter be referred to as the NPD judgment and the AD judgment.

<sup>33</sup> The facts are taken from the NPD judgment at 650F-I.

in 1981 but were not yet due to be heard at the time of the arrest of the *Berg*.<sup>34</sup> The purpose of the arrest of the *Berg* was to enable *Euromarine* to obtain security for the arbitration proceedings in London. This set of facts caused Milne JP to remark that:

‘This is, on the face of it, rather a remarkable proceeding. The applicant, which is a foreign company, seeks an order that the *Berg*, a vessel owned by a local company, be arrested, and that it be held as security for the claim of the applicant against another foreign company in respect of damages allegedly suffered by the applicant, arising out of the alleged breach of a time charterparty of another vessel, which claim is subject to arbitration proceedings in London.’<sup>35</sup>

Remarkable or not those facts set the stage for the consideration of two fundamentally important legal issues.

(a) **The separate nature of proceedings commenced by the arrest of an associated ship**

One of the novel provisions in the Act was the provision in section 5(3) which permitted the arrest of a vessel solely for the purpose of providing security for proceedings, either in a court or by way of arbitration, whether contemplated, pending or proceeding and whether in the Republic or elsewhere.<sup>36</sup> The relevant section then read:-

‘(3)(a) A court may in the exercise of its admiralty jurisdiction order the arrest of any property if:-  
 (i) the person seeking the arrest has a claim enforceable by an action *in rem* against the property concerned or which would be so enforceable but for arbitration or proceedings contemplated in sub-para. (ii);  
 (ii) the claim is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding either in the Republic or elsewhere and whether or not it is subject to the law of the Republic.  
 (b) Unless the court orders otherwise any property so arrested shall be deemed to be property arrested in an action in terms of this Act.

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<sup>34</sup> Whether the delay in pursuing the arbitration to a conclusion was due to the absence of security does not appear from the reports of the case.

<sup>35</sup> NPD judgment 649A-B

<sup>36</sup> All the commentators on the Act remark on the novelty of this provision. Friedman, *op cit.* 56; Staniland, 1985 LCMLQ 462-473; Booysen. *op cit.* 82.

(c) A court may order that any security for or the proceeds of any such property shall be held as security for any such claim or pending the outcome of the arbitration or proceedings.’<sup>37</sup>

It is a requirement of section 3(a)(i) that the party seeking the arrest must have a claim enforceable by an action *in rem* against the vessel to be arrested. The owners of the *Berg* contended that this requirement was not satisfied. Their argument was that the claim was not one enforceable by an action *in rem* against the *Berg*. They accepted that *Euromarine* had a claim and that the claim was one that could have been enforced by an action *in rem* against the *Pericles*. They also accepted that the *Berg* was an associated ship in relation to the *Pericles* and accordingly that the claim could have been pursued in an action *in rem* in South Africa instituted by the arrest of the *Berg* as an associated ship. However, they contended that such an action would remain an action *in rem* against the *Pericles* and was accordingly not an action *in rem* against the *Berg* itself.<sup>38</sup> This contention was expressed by way of the submission that:-

‘What the Act has achieved is to permit the institution of the action *in rem* against the *Pericles* by the arrest of the *Berg*. The right to bring such proceedings by way of the arrest of the *Berg* as an associated ship is not in itself an action *in rem*, it is merely an available alternative to the arrest of the *Pericles* in circumstances where arrest is required in terms of the Act in order to enable the Act (sic) to be instituted.’ [Presumably ‘action’ was intended rather than ‘Act’].<sup>39</sup>

A slightly different formulation of the point was in the following terms:-

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<sup>37</sup> In *Katagum Wholesale Commodities Company Limited v The m.v. Paz* 1984 (3) SA 271 (N) 263E Friedman J said that: ‘The section, in effect, empowers a Court to arrest, at the instance of a foreigner, a ship, owned by a foreigner, as security for a claim pending in some foreign country which is based on a foreign cause of action and is subject to a foreign law.’

<sup>38</sup> It is interesting to note that in a draft of the Act distributed in early 1983 after the publication of the Law Commission report a fresh section 5(3)(b) was incorporated reading as follows: ‘An associated ship may be arrested as if it were the particular ship in respect of which the maritime claim arose, and shall be deemed for the purposes of this Act to be the particular ship in respect of which the maritime claim arose.’ The origin of this provision and the reasons for its incorporation and subsequent disappearance are not apparent. Similar deeming provisions had appeared in two drafts circulated in 1981 but had been deleted from the draft attached to the report. Had such a provision found its way into the final version of the Act the nature of the action *in rem* against an associated ship would have been fundamentally different.

<sup>39</sup> NPD judgment 651G-I. Author’s insertion.

‘... in order to commence proceedings, an applicant may arrest an associated ship, but the maritime claim and the action *in rem* in terms of which it is sought to be enforced is still against the ship (and therefore the owners of it) against or in respect of which the maritime claim arose.’<sup>40</sup>

The answer to this point was by no means self-evident notwithstanding the reference in section 11(8) of the Act<sup>41</sup> to ‘an action *in rem* against an associated ship’. However, the language of section 3(6), which creates the right to arrest an associated ship is more ambivalent in saying merely that an action *in rem* may be brought by the arrest of an associated ship ‘instead of’ the ship in respect of which the claim arose. That language does not necessarily foreshadow that an action *in rem* commenced by means of the arrest of an associated ship is something distinct from an action *in rem* against the ship concerned.

The argument that the action instituted by the arrest of the associated ship is nonetheless an action *in rem* against the ship concerned gains some support from a reference to sections 3(4) and (5). Under section 3(4) a maritime claim may be enforced by an action *in rem* in two circumstances, namely where the claimant has a maritime lien over the property to be arrested or where the owner of that property would be liable to the claimant in an action *in personam* in respect of that claim.<sup>42</sup> The section therefore identifies the necessary conditions for bringing an

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<sup>40</sup> NPD judgment 651I.

<sup>41</sup> The section then read : ‘Where the fund arises by reason of an action *in rem* against an associated ship, the ranking of claims set out in this section shall, notwithstanding the provisions of section 3(6), apply with regard to claims in respect of the associated ship, and claims in respect of the ship concerned shall be paid thereafter in the order set out in this section.’ In the NPD judgment at 656D-657D some considerable reliance is placed upon the words ‘an action *in rem* against an associated ship’ and on the fact that s11(8) provided that where a fund arises in consequence of the sale of an associated ship, claims lying against that ship by virtue of its own activities are to rank before claims against the fund arising by virtue of the fact that it is an associated ship. However it was necessary for section 11 to make provision for the distribution of a fund arising from the sale of an associated ship and in doing so to deal with the ranking of direct claims relative to claims advanced on the basis of the ship being an associated ship in relation to some other vessel. The obvious policy decision was that direct claims against the fund arising from the activities of the associated ship should rank ahead of claims against the fund by virtue of its status as an associated ship. The existence of the section in the Act is therefore a neutral factor. The fact that the associated ship is a different vessel from the ship concerned - a self-evident and necessary proposition (although the contrary was argued in *my ‘Bavarian Trader’*: *Pancoast Trading SA v Orient Shipping Rotterdam BV* A253/2009, unreported - is not a ‘notion’ inherent in the language of s11(8) as was said at 656H-I, but something that flows from the very concept of an associated ship.

<sup>42</sup> There is some additional scope for the bringing of an action *in rem*. *Great River Shipping Inc v Sunnyface Marine Limited* 1994 (1) SA 65 (C); *October International Navigation Inc v my Fayrouz IV* 1988 (4) SA 675 (N) 678J-

action *in rem*. Section 3(5) deals with the manner in which such an action is to be brought, namely by the arrest:-

‘... of property of one or more of the following categories against or in respect of which the claim lies:-

- (a) the ship, with or without its equipment, furniture, stores or bunkers;
- (b) the whole or any part of the equipment, furniture, stores or bunkers;
- (c) the whole or any part of the cargo;
- (d) the freight.’

An arrest, or a deemed arrest in terms of section 3(10)(a) is an essential element of the process whereby an action *in rem* is to be brought to court.<sup>43</sup> If, as has been held<sup>44</sup> the meaning of the words ‘instead of the ship in respect of which the maritime claim arose’ is: ‘in place of, in lieu of, in room of; for, in substitution for’<sup>45</sup> then the associated ship could be treated as simply being arrested in place of the ship concerned, but without otherwise altering the nature of the action *in rem* thereby instituted. That action would then be an action *in rem* against the ship concerned not an action *in rem* against the associated ship. The action would be instituted by the arrest of the associated ship ‘instead of’ the ship concerned, but would remain an action *in rem* against the ship concerned.

Such a construction, whilst excluding the possibility of arresting an associated ship as security in terms of section 5(3), would have had important consequences. If the action remains an action *in rem* against the ship concerned then presumably its effect will be to extinguish any maritime lien attaching to the ship concerned as a result of the maritime claim in question. If a

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679D. However the scope is limited. *MF v ‘Atlantic Pride’ Siyadoba Fishing (Pty) Limited v Marine Radio Acoustic Devices CC*, AC 146/2003 (Cape), SCOSA B224. Whatever its ambit it is not relevant for present purposes.

<sup>43</sup> *m.v. Jute Express v Owners of the Cargo Lately Laden on Board the m.v. Jute Express* 1992 (3) SA 9 (A) 19H-I.

<sup>44</sup> *m.v. Fortune 22 : Owners of the m.v. Fortune 22 v Keppel Corporation Limited* 1999 (1) SA 162 (C) 163I-J

<sup>45</sup> In the NPD judgment 655G Milne JP says that: ‘Where an arrest is effected in terms of s3(6) of the Admiralty Act, it is quite clear that *it takes the place of the ship in respect of which the maritime claim arose*, and the vessel arrested would ordinarily speaking be the only defendant.’ (Emphasis added.)

question of tonnage limitation arises in the action<sup>46</sup> it will be clear that the court is concerned with the tonnage of the ship concerned and the fault and privity of its owners, not with the tonnage of the associated ship and the obvious absence of any fault or privity on the part of its owners.<sup>47</sup> Other conundrums<sup>48</sup> would have been resolved more easily. More particularly an arrest of an associated ship in order to furnish security for a claim against the ship concerned would not have been permissible.

Notwithstanding points such as these, which are not necessarily reflected in the arguments, the Full Court unanimously rejected this contention.<sup>49</sup> In approaching the problem Milne JP analysed in general terms the nature of an action *in rem* and concluded<sup>50</sup> that the essence of the action is the right to arrest a ship and satisfy any judgment from the proceeds of the sale of the ship or any bail or security provided to prevent its arrest or secure its release. Having done so he concluded that an arrest of the *Berg* would clearly have been permissible for the purposes of enforcing the maritime claim in question by way of an action *in rem*. In regard to the nature of that action he said:-

‘As that action would be commenced by the arrest of the *Berg*, and as any judgment in that action would be satisfied from the proceeds of the *Berg*, I cannot conceive that the action could be said to be anything other than an action *in rem* against the *Berg*.’<sup>51</sup>

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<sup>46</sup> Under s261 of the Merchant Shipping Act, 57 of 1951.

<sup>47</sup> This question will be discussed in Chapter 13 in considering the nature and consequences of an action *in rem* against an associated ship. A number of problems arise in invoking tonnage limitation in such a situation. Although my ultimate conclusion is that limitation can be invoked in an action *in rem* against an associated ship and that the computation of the limitation amount and questions of fault and privity are dealt with as if the action was one against the ship concerned, had the Full Court upheld the contention under discussion this would have been reasonably clear which is by no means the present situation.

<sup>48</sup> Including the issues raised in the *m.v. Fortune 22*, *supra*, and the effect of an arbitration clause in the contract on which the maritime claim is founded.

<sup>49</sup> In the case of *Leon J* only after ‘some hesitation’. NPD judgment 664I.

<sup>50</sup> NPD judgment 564I-655A

<sup>51</sup> NPD judgment 654F-G.

That sentiment was subsequently repeated at a later point in the judgment in the following terms:-

‘... I do not see how it can be said that the applicant would not have had the right to enforce its maritime claim arising out of the explosion of the *Pericles* by bringing an action *in rem* against the *Berg* .’<sup>52</sup>

With respect this put the cart before the horse. Subject to the point about retrospectivity it was never in issue that an action *in rem* could have been instituted in South Africa by the arrest of the *Berg* to enforce the maritime claim arising from the explosion on the *Pericles*.<sup>53</sup> The issue was not whether that could be done but what was the nature of the resultant proceedings. Were they an action *in rem* against the *Berg* or an action *in rem* against the *Pericles* instituted by the arrest of the *Berg* as an associated ship? Unless they were an action *in rem* against the *Berg* the arrest of that vessel in order to provide security for the claim that was the subject of the arbitration proceedings was not permitted. The associated ship jurisdiction would then have been limited to actions proceeding in South Africa, which would have substantially impaired its usefulness.

The court dealt with that question only after reaching the conclusion set out above. The result is that the reasoning that follows suffers from the ostensible flaw that the learned judge had already reached and expressed his conclusion before considering the real issue. In fairness therefore it is appropriate to set out the relevant passage in full. It reads:-

‘Mr. *Gordon*, for the third respondent, however submits that, although procedurally the action might be instituted by arresting the *Berg*, the action would remain one against the *Pericles*. I do not think this correct. *It is true that the cause of action, but for one important difference, remains the same.* The mere fact that the applicant elected to arrest the *Berg* instead of the *Pericles* could not affect the nature, amount or enforceability of the applicant’s claim. It is inconceivable, for example, that the legislature could have intended to deprive the owners of the *Berg* of any defence which would have been open to the owners of the *Pericles*. Mr. *Gordon* referred to the decision in *Freightmarine Shipping Limited v S Weinstein & Co (Pty) Limited and others* 1984 (2) SA 425 (D) as authority for the proposition that, since the third respondent is not a party to the

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<sup>52</sup> NPD judgment 655C.

<sup>53</sup> NPD judgment 651B.



arbitration clause contained in the charterparty between the applicant and the owner of the *Pericles*, it could not have referred the dispute to arbitration, and therefore could not have applied for a stay of action under the Arbitration Act. That case is clearly distinguishable. It concerned the liability of an agent in terms of s311 of the Merchant Shipping Act 57 of 1951, and furthermore the party applying for a stay was not the only party to the proceedings. Where an arrest is effected in terms of s3(6) of the Admiralty Act, it is quite clear that it takes the place of the ship in respect of which the maritime claim arose, and the vessel arrested would ordinarily speaking be the only defendant.’(My emphasis)

The key to this passage lies in the words ‘but for one important difference’ in the highlighted sentence. With respect the reasoning concerning an arbitration clause seems fallacious and avoids the issue raised by the submission. The question posed by the argument was this. If a bill of lading or charterparty provides for arbitration or the exclusive jurisdiction of a foreign court, but the claimant pursues its claim by way of an action *in rem* in South Africa commenced by the arrest of an associated ship, can the owners of the associated ship seek a stay of the South African action on the basis of the arbitration or foreign jurisdiction clause? The *Freightmarine* case suggested that they could not on the simple grounds that the owners of the associated ship could not claim to be parties to the arbitration agreement. Similarly they could not claim to be parties to a contract embodying a foreign jurisdiction clause. In that case there would be the further difficulty that their vessel would not be liable to be arrested in proceedings before the foreign court. Whilst the *Freightmarine* case was distinguishable on its facts it raised a similar problem and appeared to suggest that the owner of the associated ship would not be entitled to invoke the benefit of the arbitration or foreign jurisdiction clause. The significance of this is that in section 7(1) the Act contains express provision for the enforcement of such clauses and the tendency has been for the courts to enforce them.<sup>54</sup> If it is not open to the owner of an associated ship to invoke the benefit of such a clause then it is not correct to say, as had been said immediately before, that it was inconceivable that the legislature could have intended to deprive the owners of the associated ship of any defence (or at least any advantage) which could have been open to the owners of the ship concerned.

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<sup>54</sup> *m.v. Spartan Runner v Jotun-Henry Clark Limited* 1991 (3) SA 803 (N); *m.v. Achilles v Thai United Insurance Company Limited* 1992 (1) SA 324 (N). The latter case illustrates the manifold advantages that may accrue from the

The reason for saying that the key to this passage and the ultimate decision on this point lies in the words ‘but for one important difference’ is apparent from the following portion of the judgment. It reads:-

‘As I have already mentioned, however, there is a vital distinction between an action commenced by arresting the *Berg* in terms of s3(5) and an action commenced by arresting the *Pericles* in terms of that section. It is, quite simply, this, that the action is against a different defendant. This is not a mere matter of form. If the *Berg* is arrested in terms of s3(5) read with ss(6) and (7), then, at any rate, if the action is undefended, and is successful, it is only the fund derived from the sale of the *Berg* which can be used to satisfy the judgment. In what sense can it be, one might ask, that the action instituted by arresting the *Berg* would remain one against the *Pericles*? If the American approach is adopted to actions *in rem*, then the *Berg* is the defendant and not the *Pericles*. If the British approach is adopted, then the only sense in which it can be said that an admiralty action *in rem* is against a particular vessel is in the sense that it is the proceeds of that vessel that are used to satisfy the judgment, and in this sense clearly the action commenced by arresting the *Berg* **remains** one against the *Berg*. Even if an action commenced by arresting the *Berg* were to be defended by the second respondent [the owners of the *Pericles*] or the third respondent [the owners of the *Berg*], that would not automatically render the *Pericles* liable to attachment. If a judgment were eventually to be obtained which would have the effect of a judgment against the second respondent, then presumably it would only be the assets of the second respondent at the time that execution was levied on the judgment that could be attached and, if the *Pericles* had been sold in the meanwhile, it would not be liable to attachment, not having been arrested or attached and not being the subject of a maritime lien.’<sup>55</sup> (My emphasis and insertions.)

A fair reading of this passage reflects that the central issue for the court as far as the nature of the action was concerned was that an action against the associated ship involves a different defendant than an action against the ship concerned. This is more than simply a matter of form arising from an adoption of the American theory of personification of the vessel, and the court was careful not to accept or reject this theory. It is the following portion of the judgment that matters. There the heart of the matter is said to lie in the fact that if the claimant is ultimately successful and obtains a judgment the ship that is sold in order to satisfy that judgment is not the ship concerned but the associated ship. In other words property belonging to a legal person other than the owner of the ship concerned is sold to satisfy the debt of the ship concerned and its

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enforcement of such a clause. See also *Owners of the Cargo Lately Laden on Board the m.v. Nantai Prince v Nantai Line Company Limited*, Case No. A137/96 (Durban), SCOSA A12.

<sup>55</sup> NPD judgment 655H-656D.

owner. That will be so even in the situation, which the court postulated,<sup>56</sup> of the judgment being effectively a judgment against the owner of the ship concerned. There is nonetheless ‘an additional, or rather alternative defendant’ from whom payment of the claim can be sought and against whom payment can be enforced.<sup>57</sup>

This reasoning is not only compelling but, it is submitted, is inescapable. Whatever the strength of the arguments for the opposite contention and the criticisms that can be addressed to the refutation of those arguments in the judgment, the reality is that if the matter proceeds to judgment and the vessel is sold a claim lying against A will be enforced against the property of B. If one accepts, as English courts have accepted from at least the latter part of the 19<sup>th</sup> Century, that the action *in rem* has the effect of ‘impleading the owner of property to answer to the judgment of the court to the extent of his interest in the property’,<sup>58</sup> then it is the owner of the associated ship who is impleaded by the arrest of that vessel, not the owner of the ship concerned. If the American approach is adopted the fact is that the action is directed at a different vessel. It necessarily follows that the proper characterisation of the action instituted by the arrest of the associated ship is that it is an action *in rem* against the associated ship, not an action *in rem* against the ship concerned.

The owners of the *Berg* did not pursue this point when the matter went on appeal.<sup>59</sup> However, it is clear that the Appellate Division endorsed the central premise of the Full Court’s judgment. That much is apparent from the following passage from the judgment of Miller JA:-

‘Such provision, it was said, in effect provided the legal machinery by which a claim could be enforced. It is true that s3(6) read with s5(3) describes a method for recovery of

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<sup>56</sup> NPD judgment 656B-C.

<sup>57</sup> NPD judgment 659E.

<sup>58</sup> *The Parlement Belge* (1880) 5 PD 197 (CA); 4 Asp MLC 234. It matters not whether one speaks, as did Brett MR in that case, of ‘indirectly’ impleading the owner. The distinction between being directly or indirectly impleaded is unlikely to occur to or console an owner whose ship is sold.

<sup>59</sup> AD judgment 709E-G.

money due to one who has suffered injury or loss for which he has a maritime claim, but it does much more than that; it gives to the claimant a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him. It provides the claimant not only with a method for recovery but with an additional or alternative defendant. And by that token, it is creative of new liabilities or obligations in owners of ships, or the potential thereof...<sup>60</sup>

In the result the judgment in *The Berg* established from the very inception of the Act that an action *in rem* against an associated ship is something separate and distinct from an action *in rem* against the ship concerned. Whilst the action *in rem* traditionally impleads the owner of the ship concerned it can now be used to implead a third party, albeit one closely connected to the owner of the ship concerned. That immediately raises the question whether the traditional consequences of an action *in rem* can apply to such an action and if not in what way they fall to be adapted to this novel situation. For example the English Courts have adopted a procedural theory of the nature of the action *in rem* based on the proposition that whatever its form it is in substance an action against the owner of the vessel. Is that explanation adequate in the case of an action *in rem* against an associated ship? Questions arise as to whether there is some sort of incipient liability which is crystallised when the associated ship is arrested?<sup>61</sup> Does the owner of the associated ship stand in precisely the same position as the owner of the ship concerned? What is the position in regard to arbitration clauses, exclusive foreign jurisdiction clauses and tonnage limitation? What is the effect of an action against an associated ship on the continued existence of a maritime lien over the ship concerned? Does a statutory provision that attaches liability on this basis pass muster in terms of the Bill of Rights? These and other questions will be addressed at a later stage. In the meantime it is necessary to turn to deal with the other question raised in this important case.

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<sup>60</sup> AD judgment 712C-E.

(b) Retrospectivity

The underlying claim in *The Berg* had arisen in 1978, some five years before the commencement of the Act. The arbitration proceedings had commenced in 1981, two years before the Act's commencement.<sup>62</sup> In those circumstances a question that arose was whether the novel provisions governing arrests of associated ships could be invoked to commence actions *in rem* against vessels other than the ship in respect of which the claim had arisen. The question was not entirely novel in that it had been raised and considered two months before the argument in the *Berg* in a case involving a vessel called the *MV Kyoju Maru*.<sup>63</sup> The decisions in the two cases highlight some of the problems created by this new maritime institution.

In *The MV Kyoju Maru* the Court (Leon J) stated the general rule that ordinarily statutes are not to be construed as having retrospective effect, but as operating on cases or facts that come into existence after the passing of the statute. However procedural statutes are treated differently and usually operate in relation to all procedural issues arising after they come into force, unless their effect is to interfere with vested rights. The ultimate task is always to ascertain the intention of the legislature as it emerges from the statute in question. The judge accepted that it would not have been possible prior to the Act coming into operation to have arrested the *MV Kyoju Maru* in an action *in rem* or to have caused it to be attached *ad fundandam et confirmandam jurisdictionem*. However he did not accept that the effect of these provisions was to create any new right vested in claimants. The pertinent part of the judgment reads as follows:

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<sup>61</sup> The similarity between this language and that traditionally used in regard to the attachment of maritime liens will be apparent. *Harmer v Bell: The Bold Buccleugh* 7 Moo PCC 267; 13 ER 884 (PC); *Transol Bunker BV v MV Andrico Unity and others Grecian-Mar SRL v MV Andrico Unity and others* 1989 (4) SA 325 (A)..

<sup>62</sup> The handing down of an arbitration award after the commencement of the Act in respect of a claim that arose before the Act's commencement would have raised a similar, but distinct, issue in view of the fact that the enforcement of an arbitration award is a maritime claim in its own right. See para (x) of the original definition of 'maritime claim' now para (aa) of the current definition. This issue arose in *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA).

<sup>63</sup> *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D)

‘The fallacy in the ... argument is to treat the new right as a new cause of action. The plaintiff’s claim is a claim for disbursements and cash advances. That is a ‘maritime claim’ in terms of the definition in s 1(1) of the Act. Section 3 of the Act, which is headed ‘Form of proceedings’ is manifestly procedural in nature. ... Subsection (6) provides that certain actions *in rem* (which includes that in this case) may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose. ... In my opinion ss 3(6) and 3(7) are clearly procedural in nature in that they merely provide a remedy whereby an existing claim may be enforced leaving the merits of the claim unaffected. The subsections do not involve any interference with existing rights and obligations, inasmuch as they do not affect the nature and validity of the claim, but merely provide a procedure for enforcing it.’<sup>64</sup>

It will be seen from this that the court’s approach was that it was concerned only with a matter of procedure. This view did not however find favour when the point was argued before the Full Court. Even its author, Leon J, whilst coming to the same conclusion, disavowed this line of reasoning on the basis that ‘The matter does not seem to me now as it appeared to me then.’<sup>65</sup>

The approach of the majority in the Full Court continued the theme sounded earlier in the judgment of Milne JP on the question whether an action *in rem* instituted by the arrest of an associated ship was to be treated as an action against that ship or a procedural device for bringing an action *in rem* against the ship concerned. It recognised that no action would have lain against the *Berg* by way of proceedings *in rem* prior to the Act and no claim could have been instituted against its owner founded on an attachment of the vessel. In those circumstances the majority held that:

‘No such rights existed either at common law or under the admiralty jurisdiction of this Court prior to the coming into operation of the Admiralty Act. A new right is clearly created, and, correspondingly, a new obligation. ... Nor is the right a merely procedural one. In effect the legislature has given the maritime claimant an additional, or rather alternative, defendant from which to satisfy his claim which arose against the original guilty defendant.’<sup>66</sup>

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<sup>64</sup> At 213G-214E.

<sup>65</sup> NPD judgment 667D quoting Bramwell B in *Andrews v Styrap* (1872) 26 LT 704 at 706.

<sup>66</sup> NPD judgment 659E-F.

On appeal to the Appellate Division that court adopted the same stance. It accepted - and indeed this was accepted in the argument of counsel - that the provisions under consideration constituted a new development that could expose the owners of associated ships to a greater risk of liability than had been the case prior to the Act's enactment. The purpose, of the provisions, as explained by counsel and accepted by the Court is 'to make the loss fall where it belonged by reason of ownership, and in the case of a company, ownership or control of shares.'<sup>67</sup> However the Court understood the argument to be that notwithstanding its novelty and potential effects the invocation of this remedy was permissible because 'because it is in essence a provision relating to procedure rather than to substantive or vested rights'.<sup>68</sup> This contention it rejected in no uncertain terms. Miller JA said:

'The contention on behalf of the appellant was, however, that the new provision enabling a claimant to bring an action *in rem* by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose should be taken to have retrospective effect, because it is in essence a provision relating to procedure rather than to substantive or vested rights. Such provision, it was said, in effect provided the legal machinery by which a claim could be enforced. It is true that s 3(6) read with s 5(3) describes a method for recovery of money due to one who has suffered injury or loss for which he has a maritime claim, but it does much more than that; *it gives the claimant a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him. It provides the claimant not only with a method for recovery but with an additional or alternative defendant. And by that token, it is creative of new liabilities or obligations in owners of ships, or the potential thereof*, of which such owners, if the claims arose prior to the commencement of the Act, would have been wholly unaware and unsuspecting.' (My emphasis)

The importance of this finding lies in that part of the decision where it is held that by permitting an action *in rem* against an associated ship the legislation creates substantive rights in the claimant and imposes obligations, actual or potential on shipowners. This in turn goes to the

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<sup>67</sup> AD judgment 712A-B. It is hardly surprising that the court accepted counsel's explanation as counsel for the appellant was Mr Shaw QC whose role in drafting the Act has already been mentioned.

<sup>68</sup> AD judgment 712B-C. This was a misunderstanding as Mr Shaw noted in footnote 74 at page 42 of his book *Admiralty Jurisdiction and Practice in South Africa*. His complaint (as the counsel whose argument was misunderstood) is borne out by a perusal of the heads of argument from which it is plain that his contention was that the internal indications in the Act revealed an intention that the new provisions should apply to claims arising before they came into operation. However in fairness to Miller JA who delivered the AD judgment he also dealt with and rejected this contention at 710J-711D.

heart of the action *in rem* against an associated ship and affects the formulation of a theory of that action that treats it as procedural. It is one thing to say that an action *in rem* is a form of procedure that impleads the owner of the vessel because at the end of the day it is the owner who stands to lose the vessel against which the action is brought.<sup>69</sup> The conclusion that the action is purely procedural is then at least to some extent dependent on the underlying concept that the claim is one against the owner of the ship and Lord Steyn was careful to say that he was not considering the case of a maritime lien where in certain circumstances the owner may not be liable on the claim<sup>70</sup>. However when it is clear that the person who will bear the ultimate responsibility for the claim is someone other than the person who is responsible for the loss or damage giving rise to the claim this approach requires reconsideration. The question then is whether it is the invocation of those means by way of the arrest of a true associated ship that gives rise to the liability that rests on the owner of the associated ship or whether that liability is inherent in the Act and given effect by the arrest of the associated ship. That the liability is imposed as a matter of substantive law seems clear.

The conclusion in *The Berg* on the question of retrospectivity and flowing from that the substantive elements of these provisions does not stand in isolation. A similar problem of retrospectivity has arisen subsequently in two cases arising out of the amendments to the Act brought about in 1992.<sup>71</sup> In the first case the relevant amendment had the effect of altering the scope of the jurisdiction to arrest an associated ship<sup>72</sup> and in the second the effect of an amendment to the presumption in section 3(7)(c) was to broaden the circumstances in which a ship could be characterised as an associated ship, thereby broadening the scope of the

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<sup>69</sup> As Lord Steyn said in *The IndianGrace (No. 2), Republic of India and another v India Steamship Company Limited* [1997] 4 All ER 380 (HL); [1998] 1 Lloyd's Rep 1 (HL).

<sup>70</sup> At 387D-F.

<sup>71</sup> By the Admiralty Jurisdiction Regulation Amendment Act, No 87 of 1992.

<sup>72</sup> *National Iranian Tanker Co v MV Pericles* CC 1995 (1) SA 475 (A).



jurisdiction.<sup>73</sup> In the first case the effect of the amendment was to enable the vessel to be arrested even though it could not have been arrested prior to the amendments. The Court held that an arrest was impermissible in respect of the claim on the grounds that:

‘... it would operate in a manner which prejudiced shipowners by creating burdens or obligations that did not exist before.’<sup>74</sup>

It also said that on the authority of its decision in *The Berg* ‘the provisions in question cannot be regarded as purely procedural’.

In the second case it was common cause that the underlying claim under a charterparty could not have been pursued by way of an associated ship arrest prior to the amendments to the Act. On the authority of *The Berg* and *The Pericles* that would have prevented an arrest after the amendments either to commence an action *in rem* or to provide security for proceedings elsewhere. What was said by the claimant to make a difference was that the dispute had been determined by arbitration proceedings and an award had been made in its favour after the amendments came into effect. If upheld that would have created the curious result that an arrest for the purpose of providing security for the arbitration would have been impermissible but an arrest to enforce the resultant award would not. The court avoided this result by holding that the arbitration award constituted a derivative cause of action in the sense that it owed its existence to the underlying claim and could not be divorced from it. To permit the arrest would:

‘... amount in substance, if not in form, to saddling ships and persons with retroactive liability in respect of breaches of contract and the commission of delicts for which they were not liable at the time when they occurred.’<sup>75</sup>

Both of these decisions strengthen and fortify the impact of the judgment in *The Berg* on the issue of the nature of an action *in rem* against a true associated ship. Whilst they accept that

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<sup>73</sup> *MV Yu Long Shan v: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA)

<sup>74</sup> At 484G-H.

<sup>75</sup> *MV Yu Long Shan*, *supra*, 653 I-J.

the statutory provisions providing for such an arrest are procedural in form they do not accept that they are purely procedural in character. The reason for this lies in the fact that the action so instituted is distinct from an action against the ship concerned and accordingly must be viewed on the basis that the liability of the vessel arises not from any liability of its owners but from the fact of association and the application of the South African legislation. The recognition of companies as having separate corporate personality leads inexorably to the conclusion that this is a new and separate type of action from the conventional action *in rem*, which provides for a new and different liability from any that existed prior to the action being commenced. The common feature is the form in which the claim is pursued but an analysis of the underlying liability reveals that this type of action *in rem* is markedly different from any that has previously existed in other jurisdictions. That fact is recognised by the courts in these judgments but its implications for a consideration of the nature of the action *in rem* thereby commenced has not yet been worked out, either by the courts or in academic writing. It is a topic to be dealt with later.<sup>76</sup>

#### 4 **THE ASSOCIATED SHIP IN PRACTICE**

The definition of an associated ship encompassed both the sister ship, a concept already well-known through the Arrest Convention, and the true associated ship. In practice however the sister ship is of little relevance. It may be the case that some sister ship arrests have occurred and there are certainly still some fleets that operate with a single owner particularly those national fleets that are still owned by governments.<sup>77</sup> However the relevant provisions do not appear to have occasioned any difficulty.<sup>78</sup> This is a reflection of the changing patterns of ship ownership that rendered the provisions of the Arrest Convention largely redundant as a practical measure. It is also indicative of the value of a provision that goes beyond the limits of the Convention and

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<sup>76</sup> In Chapter 12.

<sup>77</sup> I understand that this is true of the Indian national fleet and it was also true of the national fleets of a number of socialist countries although that has changed in recent years with political changes in most of those countries.

<sup>78</sup> There are no reported cases in which the court has had to consider these provisions nor do any of the unreported judgments circulated by the MLA or reported in certain private commercial reports consider them.

addresses the *de facto* modern day pattern of ship ownership. It seems that international maritime law is confronted with a choice. Either it accepts that the effective use of corporate structures will protect all but the ships in respect of which claims arise or it must go beyond that to a new paradigm where those corporate structures will be disregarded in the interests of providing maritime claimants with more effective means of enforcing their claims. As explained in the previous chapter whether a State adopts the one course or the other will be a policy choice based on that state's own commercial and political interests. The true associated ship provisions emphatically follow the second course.

By contrast with the sister ship provisions of the Act the provisions relating to the true associated ship rapidly became a source of legal disputes. Four fundamental issues can be identified as having arisen at an early stage. All of these arose either at the initial stage of action proceedings where a vessel was arrested in an action *in rem* and the validity of that arrest was challenged or where an order for its arrest was sought in terms of section 5(3) of the Act and that application was opposed. In each instance the essential questions were the same. First what burden of proof must the party seeking such an arrest discharge in order to obtain or maintain the arrest? Second, what did the provisions of section 3(7)(a)(ii) of the Act mean when they referred to control of the shares in a company that owned the ship? Third, when had the association to exist? Lastly what evidence would be admissible and relevant to enable an applicant for arrest to prove the requisite association between two vessels? These questions arose under the terms of the Act as they stood at its inception. Some of the problems that arose in answering these questions underlay the amendments effected in 1992 and a discussion of those problems will indicate why the amendments took the form that they did. Most importantly, however, it is necessary to consider to what extent the early decisions continue to provide a guide to the interpretation and application of the Act.

#### (a) **The burden of proof**

In considering this issue a distinction needs to be drawn between various different burdens that an arresting party or an applicant for arrest may bear. In accordance with the general rule that

the person who alleges must prove<sup>79</sup> it has never been disputed that the applicant seeking the arrest is obliged to show its entitlement to that relief.<sup>80</sup> The more important question is what must be proved? Here the form of the proceedings, namely whether it is an arrest pursuant to an action *in rem* or a security arrest, may affect, if not what must be established by the applicant, at least the stage at which the burden of proof must be discharged. What is common to both proceedings is the need to establish a claim and the need to prove that the vessel is susceptible to arrest, in other words that it is an associated ship in relation to the ship concerned, in respect of which the maritime claim is alleged to have arisen. In addition, when the arrest is sought under section 5(3) to obtain security for proceedings elsewhere or for arbitration proceedings it is necessary for the applicant to demonstrate a genuine and reasonable need for the security that it seeks<sup>81</sup>.

Differences arise in relation to each of these separate elements. An arrest is only permissible if the applicant has a maritime claim enforceable by an action *in rem* against the ship concerned. Insofar as such claim is concerned it would subvert the entire purpose of the jurisdiction if the applicant had to establish the merits of the claim at the stage of the arrest. There would then be no need for the trial or arbitration as the case might be. Accordingly in order to obtain and maintain an arrest the test is set lower than the conventional test in civil cases of proof on a balance of probabilities. Initially the view was taken that the applicant should show *prima facie* that it had reasonable prospects of success in the main proceedings.<sup>82</sup> However the Appellate Division decided that the test should be the same as that applied in the case of applications for an attachment *ad fundandam et confirmandam jurisdictionem* namely whether the applicant had shown a *prima facie* case in the sense that there is evidence which, if accepted,

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<sup>79</sup> *Pillay v Krishna* 1946 AD 946.

<sup>80</sup> *Transgroup Shipping SA (Pty) Ltd v Owners of MV 'Kyoju Maru'* 1984 (4) SA 210 (D) 214H relying upon *American Cotton Products Corporation v Felt and Tweeds Ltd* 1953 (2) SA 753 (N) and *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and others* 1976 (4) SA 464 (A) 489.

<sup>81</sup> As to what constitutes a genuine and reasonable need for security see *mv Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA)

will establish a cause of action.<sup>83</sup> This is a relatively easy hurdle to surmount. A dispute of fact between the parties, even where the probabilities strongly favour the ship and its owners, will not suffice to prevent the applicant from discharging the burden of proof. It is accordingly rare, but not unknown, for applicants to fail to discharge this burden.<sup>84</sup>

By contrast the test in regard to the association of the two vessels - the ship concerned and the putative associated ship - is much higher namely the usual test in civil cases of proof on a balance of probabilities. Just as the court 'will not order the attachment of the property of another for the purpose of founding jurisdiction because to do so would be futile and of no effect'<sup>85</sup> so it has been held it will not order the arrest of a vessel or permit such an arrest to stand unless the applicant has proved on a balance of probabilities that the vessel to be arrested is an associated ship in relation to the ship concerned.<sup>86</sup> By parity of reasoning between the case of an arrest in admiralty and an attachment *ad fundandam et confirmandam jurisdictionem*, this has always been accepted to be the case. However it is by no means clear that the two situations are strictly comparable. In the case of an attachment to found or confirm jurisdiction the sole purpose of the attachment is to establish the jurisdiction of the court. Potential liability is distinct from jurisdiction and is measured against a lesser standard. Once jurisdiction has been founded or confirmed the case on the merits proceeds without any reference to the prior attachment. In other words the question of liability is wholly distinct from the question of jurisdiction and the latter question is determined at the outset. That is only partly the case with an action *in rem* commenced by the arrest of an associated ship and it is not the case at all in the case of a security arrest of an associated ship in terms of section 5(3) of the Act.

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<sup>82</sup> *Katagum Wholesale Commodities Co Ltd v MV Paz* 1984 (3) SA 261 (N) 268A.

<sup>83</sup> *Cargo laden and lately laden onboard the MV Thalassini Avgi v MV Dimitris*, *supra*, 831G-832C.

<sup>84</sup> *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas* 1995 (3) SA 112 (A); *SA Marine Corporation SA v mv 'Maritime Valour' and another*, Case No 03/2003 (Durban), SCOSA B293.

<sup>85</sup> Corbett JA in *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and others* 1976 (4) SA 464 (A) 489.

<sup>86</sup> *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) 581C-F.

With the arrest of an associated ship in an action *in rem* the determination of the question of association goes firstly to the central issue of liability and only consequentially to jurisdiction. If there is no association there is no liability and therefore no entitlement to arrest. It is otherwise when the claim of association arises in an application for the arrest of a vessel as security for a claim elsewhere in terms of section 5(3) of the Act. In that event the association founds the arrest and determines the liability to provide security but the question of liability in the proceedings for which security is sought is unaffected by the association. The distinction has not however been reflected in the case law on this topic which holds that in both cases the association must be proved on a balance of probabilities if the arrest is to be maintained. It is convenient initially to examine the issue from the perspective of an associated ship arrest in order to commence an action *in m* in South Africa. Then it can be decided whether the test or approach is or should be different when association is invoked in an application for a security arrest.

In accordance with the decision in *The Berg* discussed above the action *in rem* against an associated ship is a different action from that against the ship concerned because it attaches liability to a person other than the person against whom the claim originally arose. In those circumstances proof of the association is an essential element giving rise to liability. The jurisdiction of the court flows in turn from the provisions of section 2 of the Act that vest it with jurisdiction to determine any maritime claim irrespective of the place where it arises. The exercise of that jurisdiction is based upon the arrest of the associated ship because an action *in rem* can be commenced by the arrest of either the ship in respect of which the claim arose or an associated ship. In the absence of an association there is no liability and the vessel cannot be arrested so that liability and the exercise of jurisdiction go hand in hand.

Once that is recognised it is legitimate to ask why at the stage of applying for the arrest (or maintaining it when the arrest was granted without a court order or only after a hearing *ex parte*) the applicant should have to discharge the more onerous onus in regard to association when in relation to the balance of the elements of its claim it suffices for it to produce evidence that if accepted would give it a cause of action? In other words why is it that at the stage of justifying its arrest it is compelled to prove on a conventional balance of probabilities the fact of association,

which is an essential element of its cause of action, without the advantages such as discovery that flow from a trial action? There is no difficulty with its having to do this at the stage of trial in the same way in which it has to prove the other elements of its claim on a balance of probabilities at that stage. The problem only arises at the stage of arrest and its ability to justify the arrest at that stage. Another way of looking at it is to say that the claimant has to prove the same thing for different purposes but bears a different burden of proof depending on whether the concern is the liability of the defendant, in which event a *prima facie* case of association will suffice, or jurisdiction, in which event proof on a balance of probabilities is demanded. Such a bifurcated approach to a question of onus in relation to the same issue is unusual if not completely unknown in any other context<sup>87</sup>. This issue has never been addressed because of the assumption that it falls to be dealt with on the same basis as the requirement of proof of ownership of property sought to be attached in a common law attachment without any consideration of its dual function and relevance.<sup>88</sup>

The problem is one of considerable practical importance because of the difficulties confronting an applicant in establishing association. In the case of an associated ship the matters that have to be proved stand at one remove from the question of registered ownership (which is easily ascertainable) and are usually obscured by inaccessible or opaque company registers designed to enable the true identity of those who control the company to remain confidential. In addition the applicant for such an arrest usually does not have access to documents that would tend to establish the association and in practice the shipowner is usually reluctant or unwilling to disclose such documents and does so in an incomplete fashion. Thus it is not unusual for the applicant to be confronted with bearer share certificates produced in the offices of the shipowner

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<sup>87</sup> Certainly the author is not aware of any other situation where the situation can arise that for different purposes in the same litigation the onus on a single issue may differ.

<sup>88</sup> The question did not arise in *Bocimar NV v Kotor Overseas Shipping Ltd*, *supra*, because it was common cause in that case that the two vessels were associated ships. In both cases cited by Corbett CJ as authority for this proposition, namely *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D) 214I and *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) 497A-B the judgments record that this was common cause between counsel. The author was responsible for the concession in the first case and can only confess that he made the assumption that he now questions.

and a self-serving but incomplete set of documents designed to suggest the absence of common control, with elements such as cross-mortgages being explained on the basis of family membership or long-standing friendship.<sup>89</sup> This is accompanied by an affidavit or affidavits from the protagonists on the side of the shipowner denying common control and attributing the appearance, or even the public proclamation, of it to other factors. Discharging the onus of proving association on a balance of probabilities in motion proceedings without the benefits of discovery or cross-examination is a truly formidable task. However in principle the difficulty or otherwise of establishing matters by evidence is not a reason for moderating or departing from the ordinary rules governing the proof of matters in legal proceedings. The present concern is whether it is appropriate to burden an applicant seeking to obtain or maintain an arrest with the obligation to prove the association on a balance of probabilities at that stage. Some consideration therefore needs to be given to the appropriateness of the analogy with an attachment to found jurisdiction and the underlying reason in such a case for the differences between the burden of proof insofar as proof of ownership and proof of a *prima facie* case is concerned. The aim is to see whether it is possible to discern a principle that will help to resolve the point.

Three propositions emerge from the judgments on the onus of proof in regard to attachments. The first is that the application is treated as a precursor to a trial on the merits of the dispute between the parties limited to the question of whether the court will exercise jurisdiction. Accordingly it is thought inappropriate for such preliminary proceedings to be turned into a trial. The second is that to permit debate on the merits of the case, other than at the most superficial level, would defeat the main purpose in permitting such an attachment namely the convenience of the *incola* in litigating in its home jurisdiction against a *peregrinus*.<sup>90</sup> The third is that already

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<sup>89</sup> In the *Asian Hope* this extended to the production, at a late stage of an application to set aside an arrest, of a resolution purporting to emanate from the directors of a holding company in which they purported to divide the vessels in a fleet among themselves in breach of the conditions upon which mortgages had been granted over the vessels. Even more extraordinarily they claimed to have done this prior to the arrest but had failed to disclose it in their application papers. The curious feature of the case is that the judge did not apparently find this curious. *The Asian Hope: Asian Hope Shipping Ltd v Ocean Trade SA* SCOSA, C115 (D).

<sup>90</sup> 'To require a degree of proof of the cause of action which might prevent an *incola* from proceeding against a *peregrinus* in a case in which he would have been able to do so, had the *peregrinus* been within the jurisdiction,



referred to namely that it would be futile and of no effect to permit an attachment of the property of one person in order to secure jurisdiction over another. None of them are self-evidently applicable to arrests of associated ships.

The fact that vessel A is an associated ship in relation to vessel B means that the owner of vessel A is liable in South African law for the debts of the owner of vessel B. That liability is imposed by the terms of the Act and is a matter of substantive law. Very often, where the indebtedness of the owner of B cannot be seriously disputed, the question of association is the crucial issue in the case and will determine liability. It is submitted that it is inappropriate in those circumstances for the court to approach an issue of association on the basis that it is a purely preliminary issue of jurisdiction. It is far more than that especially if one has regard to the fact that the associated ship jurisdiction at present has no parallel elsewhere in the world so that a refusal to permit an arrest, or the setting aside of an arrest already made, will be a final determination of the question of liability adverse to the claimant.<sup>91</sup> Unlike the case of an attachment to found or confirm jurisdiction the issues of liability and jurisdiction are inextricably linked. In South African proceedings it is not customary to determine liability in disputed cases without a trial and evidence being lead and challenged yet this is what occurs if an arrest is set aside in application proceedings without a reference to evidence on the basis that the party seeking the arrest has failed to discharge the onus of proving a disputed association.

Couched as it is in the narrow chauvinistic terms of convenience to *incolae* in seeking to sue *peregrini* the second reason favouring a lower burden of proof can have little application in the context of arrests in admiralty. Most proceedings in admiralty are between parties, both of whom are *peregrini*, so that the convenience of *incolae* has little resonance in relation to the arrest of associated ships. (That is even more the case in relation to the even more common situation of an arrest under section 5(3) of the Act to obtain security for legal proceedings in

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would be out of keeping with the purpose of and reason for the procedure by way of attachment.' *per* Steyn J in *Bradbury Gretores Co (Colonial) Ltd v Standard Trading (Pty) Ltd* 1953 (3) SA 529 (W).

another jurisdiction.) In addition it is suggested that, whilst legal chauvinism may have driven the evolution of the attachment to found or confirm jurisdiction, there is a simpler and more practical reason for accepting a lower burden of proof in attachment proceedings. Where the purpose of those proceedings is truly preliminary to the determination of the claim by way of a trial, to require that the applicant discharge a more stringent burden of proof at a preliminary stage is to pre-empt the trial process, with all the safeguards that it contains to ensure that there is a fair adjudication of the claim. There is a copious body of authority in South Africa warning against the determination of disputed factual issues in application proceedings on a weighing up of the probabilities.<sup>92</sup> The reason is that the normal form of proceedings in our adversarial system is by way of trial action (*rauw actie*) which is a procedure directed at the proper resolution of factual disputes. In South Africa, as in many other jurisdictions, it is only after hearing oral evidence and requiring the disclosure of all relevant documents that it is thought appropriate to make a determination of disputed issues. Accordingly it seems inappropriate to require a person who is seeking the opportunity to prove a claim at a trial to establish a fundamental aspect of that claim on affidavits on the conventional balance of probabilities before a trial. Such an approach imposes a more severe burden of adducing evidence on the claimant at the preliminary stage than rests upon it at the subsequent trial, where it will have had the benefit of access to the other party's documents. Indeed it disposes entirely of the need for a trial on that issue and an adverse finding leads to the claimant losing its case. To do that in preliminary proceedings is unsatisfactory.

This examination of the relevance of the factors underpinning our courts' approach to attachments *ad fundandam et confirmandam jurisdictionem* to an associated ship arrest shows

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<sup>91</sup> This in turn is linked to the ability to arrest another associated ship in relation to the same claim, as to which see Chapter 8 below, and the nature and status of an action *in rem* against an associated ship, which forms the subject matter of Chapter 10.

<sup>92</sup> *Sewmungal and Another NNO v Regent Cinema* 1977 (1) SA 814 (N), a judgment that has repeatedly been cited with approval. See for example *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 197A-C

that the analogy between the two is false and it is submitted that it points towards applying the lower burden of a *prima facie* case to the question of association. The reasons are twofold. Firstly the issue is not a true preliminary issue. It is primarily an issue of the liability of the owner of the associated ship for the claim against the ship concerned and its owners. Accordingly as an issue of liability it is appropriate to apply the lower burden of proof at the stage of arrest. Secondly the issue is one which demands resort to evidence that the very nature of the institution of the associated ship recognises is not readily available to a claimant. In those circumstances to deny the claimant the benefits of a trial is effectively in most disputed cases to impose upon them a more stringent burden of adducing evidence than would be the case at a trial. They are required to prove on affidavit, in the face of opposition that may well be dishonest, something in regard to which it is highly improbable that they will have any direct evidence. In doing so they will usually have to contend that the deponents on behalf of the shipowner are not to be believed on their oath something which the court is reluctant to do in application proceedings.<sup>93</sup> Insofar as the application of the burden of proof always involves a consideration of such practical issues it is desirable that this type of disputed question should be resolved in the conventional way by way of the hearing of evidence at a trial.<sup>94</sup> The very reasons that point in the case of an attachment to the requirement that proof of the claim at a *prima facie* level is all that is required seem to point to the same conclusion on the question of association.

The third reason given for requiring proof of ownership on a balance of probabilities in cases of attachments, namely that the attachment of property not owned by the defendant will prove futile and of no effect is a little obscure. If it transpires after a trial that the property is not owned by the defendant - and indeed the named defendant may not participate in the trial in that

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<sup>93</sup> *Peterson v Cuthbert & Co Ltd* 1945 AD 420; *Da Mata v Otto NO* 1972 (3) SA 858 (A).

<sup>94</sup> In *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC) paras 55 and 56 Didcott J referred to the fact that there is no general principle applicable in determining where the onus of proof lies and quoted with approval - as our courts have done before - the passage from Wigmore on Evidence in which it is said: 'The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.' There seems to be no reason in principle why the same issues of policy and fairness should not dictate the weight of the burden at an interim stage of proceedings provided the ultimate burden of proof on a balance of probabilities is the test at the stage of any final determination.

event - then the claim will be dismissed for want of jurisdiction. That does not mean that the proceedings have been futile any more than any other proceedings that result in the dismissal of the claim without resolving its merits. This occurs whenever a defence of prescription, or limitation of actions or want of jurisdiction is upheld. If it is intended to suggest that the arrest will not result in the defendant being before the court that is by no means necessarily the case. The true owner may well be in a position to compel the defendant to appear or furnish security for the claim as frequently occurs as between shipowner and charterer. In any event if the property is valuable the true owner is likely to enter the lists in order to protect its interests in the property. It is only where the property attached has limited value that the action is likely to go by default and the claimant will be left with a useless judgment<sup>95</sup>.

Examining this proposition in the context of the arrest of an associated ship it appears less than compelling. A vessel will ordinarily have some reasonable value to its owner and very often also to its mortgagee. It is improbable that there will be no foundation for the claim to association as in that event the arrest can be set aside on even the more limited standard of proof. Accordingly the owner of the associated ship will usually be in a position to influence the giving of security to secure the release of the vessel arrested. The probability of the owner and mortgagee walking away from the vessel is much reduced in this situation particularly because the owner will not be liable at all if the vessels are in truth not associated vessels. Usually what happens in these cases is that security is provided to procure the release of the vessel and the claimant can then pursue the case in the knowledge that if successful it will be paid. In the result there is little prospect of disputed proceedings over a question of association proving futile and if the plaintiff is successful in establishing the association the ship or any security provided to secure its release will be available to satisfy the judgment.

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<sup>95</sup> Even where property is relatively worthless there may be a number of reasons why the defendant will enter the fray. The author was involved in cases where a cardboard model of a ship was attached and one where a life jacket from a wreck was attached and the owners nonetheless incurred the considerable expense of participating in the litigation, albeit in each case on certain preliminary matters that resolved the case in their favour.

All of this provides a proper basis for questioning the received wisdom that an applicant for arrest of an associated ship must prove the fact of association on a balance of probabilities at the stage of obtaining or seeking to maintain the arrest. However whilst there is much to be said for the proposition that the analogy between associated ship arrests and attachments to found or confirm jurisdiction has been pressed too far, it is probably too late at this stage to succeed in mounting an argument that the courts should reconsider their approach to the question of onus of proof of association when the arrest of an alleged associated ship is challenged, save perhaps on constitutional grounds<sup>96</sup>. An appreciation by courts that the analogy is unsound may, however, prompt them to adopt a different and more amenable approach to the question of referring to trial applications to arrest alleged associated ships or applications to set aside such arrests where the arrest is made to commence proceedings in South Africa. It is submitted that the reluctance of courts to do so, at least in the case at present under discussion of an arrest for the purpose of commencing an action *in rem* in South Africa, is ill founded and subversive of the associated ship jurisdiction. Provided the Court faced with a challenge to an associated ship arrest based on an absence of the alleged association, forms the view that there is a real and substantial dispute in this regard, it is submitted that the proper approach for it to adopt is to refer the matter to trial, either together with the merits or as a separate issue, rather than to set aside the arrest on the basis of a failure to discharge the onus. Such an approach leaves the claimant with the burden of proving the association on a balance of probabilities, but in a conventional trial well suited to resolving disputes of fact.

There are two other reasons why the courts should be reluctant to alter the requirement that association be proved on a balance of probabilities when an arrest is sought, or sought to be maintained, in response to a challenge to its validity. Firstly the issue usually arises in applications for the arrest of vessels as security in proceedings elsewhere than South Africa. Here the argument that association is a component of liability falls away because, whilst it is a necessary element for obtaining the arrest, it is irrelevant in the arbitration or court proceedings

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<sup>96</sup> See Chapter 9. Such a challenge would need to be based on the right of access to courts and issues of the rationality of the present view of the onus.

for which security is being sought because the claim there will not be based on the association but on the liability of the named defendant, whether the ship or its owner, for the maritime claim. In such a case the proceedings are truly a precursor to the main litigation and have no bearing upon it. Accordingly there are good grounds of policy for saying that a party seeking to invoke the jurisdiction of the South African court to obtain what is to all intents and purposes final relief, namely the furnishing of security, should be held to the stricter standard of proof on a balance of probabilities. It is far more debatable however whether it is correct to say as did Corbett CJ in *Bocimar* that the dispute has no connection with South Africa and on policy grounds it is undesirable for the time and resources of our courts to be taken up with preliminary issues in foreign proceedings. Parliament has vested our courts with the power to make orders that will enable foreign litigants to obtain security for proceedings elsewhere. It has done this in a special category of case arising in the sphere of maritime activity that is of fundamental importance to South African trade. In doing so it recognised the desirability in maritime matters of enabling litigants to obtain security in order to facilitate the payment of legitimate claims and the resolution of maritime disputes. It is not for the courts in those circumstances to relegate proceedings directed at obtaining such relief to some kind of second-class status having a lesser priority than other matters that come before them. The occasional resort to an insular parochialism, which one from time to time encounters in regard to admiralty cases, is undesirable and contrary to the whole purpose of the Act in expanding the scope of the jurisdiction of our courts to deal with such cases.

Secondly it is undesirable that the standard of proof in relation to these issues should vary depending upon whether the claimant is intending to pursue proceedings in South Africa or merely seeking security for foreign proceedings. The essential issue remains the same in each case and it is desirable therefore that the court's approach should be the same in each instance. Where there is scope for a difference in approach is in the attitude of the court to cases where there is an irresolvable dispute of fact on the papers and the claimant seeks the discovery of documents or the reference of the issue of association to oral evidence or trial. However in this area there is a practical difficulty. As *Bocimar* and a number of other cases demonstrate in applications for security arrests under section 5(3) the attitude of our courts has been one of

reluctance to order discovery or refer disputes over association to oral evidence because of its preliminary nature and the fact that the main litigation has no connection with South Africa.

It is submitted that this reluctance is misplaced. It flows from a perception that South African courts are involving themselves in foreign litigation and that the litigation concerns incidental issues rather than the core of the dispute between the parties. However that is not correct. In dealing with a security arrest under section 5(3) South African courts are exercising a jurisdiction vested in them by statute to afford relief in the form of an order that property be arrested to constitute security in proceedings either in South Africa or elsewhere<sup>97</sup>. In exercising that jurisdiction they are not involved in the foreign litigation because the situation is *a fortiori* one where the foreign tribunal has no jurisdiction to grant the relief sought namely an order that security be furnished as is the case with most arbitral tribunals and many courts in the absence of an arrest of the vessel in respect of which the claim arises. This has long been felt to be a defect in other jurisdictions and resulted in England in parties having resort to the expedient of commencing proceedings in that jurisdiction and resisting a stay on the grounds that they had secured the legitimate juridical advantage afforded by the security they had obtained.<sup>98</sup> It is a problem that the South African legislature set out to address in section 5(3) and the clear intention of the section is to provide assistance to litigants, both domestic and foreign, in the form of security arrests. That intention should not be undercut by a reluctance on the part of courts to become involved in this type of litigation or to dismiss it as being either foreign or essentially over peripheral issues. As practical experience demonstrates the ability to obtain security may be fundamental to the ability to resolve the dispute. From a South African perspective the only issue is whether or not an entitlement to security has been established and that is a matter of South African substantive law. It cannot be shrugged off as not being a proper concern of our courts.

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<sup>97</sup> A similar jurisdiction is vested in Australian courts under s29 of the Admiralty Act 1988.

<sup>98</sup>*The Eleftheria* (1969) 2 All ER 641 (PDA). At present claimants are making use of the jurisdiction available in the USA under Federal Supplemental Rule B to obtain security in an exercise in which the courts effectively go behind corporate identity to attach funds as security. However a recent decision in New York appears to have put an end to that practice.

The right to obtain such security is as much a substantive right as any other right conferred by statute<sup>99</sup>.

It is accordingly submitted that the reluctance our courts have displayed to becoming involved in disputed issues of association, whether in relation to security arrests or otherwise, is misplaced. The only question should be whether the claimant has raised a proper case in which to seek an appropriate order from the court to facilitate a resolution of the dispute, whether by way of discovery, oral evidence or otherwise. At the very least where the probabilities on the papers favour the party seeking the arrest or where they are at least evenly balanced the court should not rely on the onus to dismiss the proceedings but should make an order that would be appropriate in any other case where a dispute of fact arises. It is submitted that there should be even less reluctance where the purpose of the arrest is to commence proceedings in South Africa at which all issues of liability will be determined. In that situation there is no need to deal with the issue of association separately and it can and should simply be disposed of as part of the trial or separated from the main case if it is thought appropriate to do so. It is submitted that the court should examine the case advanced by the party resisting the arrest to see whether there has been a full and frank disclosure of the relevant facts and production of documents from independent sources to support its contentions. If there is reason to doubt whether it has been completely frank and open the court should not hesitate to direct that discovery be made or that a witness be cross-examined or that the matter go to trial or oral evidence. After all it lies within the powers of the party resisting arrest to make the position clear to the court and if it fails to do so or is evasive in putting up evidence it has only itself to blame if it then finds that it has to address issues of association in a trial.<sup>100</sup> We should not permit our court procedures to work in a manner that facilitates, encourages and rewards dishonesty and untruthfulness in litigation, where deponents

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<sup>99</sup> This is reinforced to some degree by the consideration that an order for security is a final order and appealable as such. *Ecker v Dean* 1937 SWA3 at 4 approved in *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1042A - H

<sup>100</sup> *The Kadirga 5 (No 1): J A Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret SCOSA C* 12 (N); *The Leros Strength: Roza v MV Progress SCOSA C* 20 (D).



feel free to lie on oath in the relatively certain knowledge that their lies will not be tested and exposed and will probably achieve their purpose of defeating a legitimate arrest.

There is a further reason of public policy for adopting this approach and it relates to the international standing and credibility of our courts. South Africa is one of the world's leading jurisdictions in maritime matters and the associated ship arrest and the ability to obtain security for proceedings elsewhere has played a major part in achieving this position. That this is beneficial not only to the lawyers who practice in this area but also to the economy generally in terms of inflows of foreign currency is apparent. In addition there is the intangible benefit that arises from an international belief that our courts are attuned to the problems arising in the sphere of international trade and willing and able to address these problems in accordance with principles well understood in the commercial community. That is a necessary foundation for our ability to attract foreign investment to South Africa. Where our courts are dismissive of the statutory jurisdiction afforded to them by legislation and say that the dispute has no connection with South Africa or that on policy grounds it is undesirable for the time and resources of our courts to be taken up with preliminary issues in foreign proceedings, so that foreigners are deprived of advantages that would normally be given to litigants by South African courts, the message it sends to the international community is negative. It suggests that their claims to exercise rights given them by a South African statute - not their claims arising in foreign proceedings - are somehow less worthy of consideration by our courts than rights vested in domestic litigants. That is an unfortunate message and one that our courts should be careful to avoid.

In the case of arrests to obtain security it was early laid down that the applicant needed to show a reasonable and genuine need for security.<sup>101</sup> The degree of proof required by an applicant

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<sup>101</sup> *MV Thalassini Avgi, Cargo laden and lately laden on board the v MV Dimitris* 1989 (3) SA 820 (A). As to the origin of this expression see *MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Company Ltd* 2009 (1) SA 246 (SCA) where it was held that what is required by this formulation is that it must be established that there is a genuine and reasonable apprehension that the party whose property is arrested will not satisfy a judgment or award made in favour of the arresting party. With respect this is unduly narrow. An apprehension that the other party 'may'

has likewise been held to be on balance of probability.<sup>102</sup> Here the reasoning seems correct. Such an application, whilst having its own substantive existence and purpose, is nonetheless an adjunct to other proceedings usually in another jurisdiction.<sup>103</sup> A decision on the question of the need for security does not involve any adjudication on the merits of the claim or on the entitlement to security arising from the association. Policy would suggest that it is undesirable to have a full-scale trial over a question whether any litigant, foreign or domestic, has a genuine need for security for an action or arbitration before a court or tribunal situated either within or outside South Africa. The approach to the onus of proof is in accordance with general principles of the nature of the burden of proof in civil litigation in South Africa - a fact that the court stressed in its judgment<sup>104</sup> - and none of the reasons for doubting that approach to the onus in the case of association appear to be applicable here. The fact of the need for security is something the applicant will be fully aware of from facts within its own knowledge and if it is unable to show that it needs security that will invariably be because the court is satisfied that the claim is already adequately secured or (possibly) that such security is obtainable by other more appropriate means. In those circumstances the decision by the court in *Bocimar* that the need for security should be demonstrated on a balance of probabilities and that no reasons of policy suggest otherwise<sup>105</sup> is with respect correct.

## **(b) Control**

In its original form section 3(7)(a)(ii) referred to ownership or control of the shares of a company and not to control of the company itself. This was unfortunate as in the deeming provision in section 3(7)(b)(ii) it was said that a person;

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not satisfy a judgment or arbitration award should surely suffice to show a genuine need for security. To require the applicant to show that they probably will not satisfy a judgment goes too far.

<sup>102</sup> *Bocimar NV v Kotor Overseas Shipping Ltd, supra*.

<sup>103</sup> In *Ecker v Dean* 1937 SWA 3, 4 Van den Heever J said of such an application: 'the claim for security was a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute between the litigants'. This was cited with approval in *Shepstone & Wylie and another v Geyser NO* 1998 (3) SA 1036 (SCA) 1042.

<sup>104</sup> *Bocimar NV v Kotor Overseas Shipping Ltd, supra*, at 580 H-I.

‘shall be deemed to control a company if he has power, directly or indirectly, to control the company.’

The result engendered a good deal of confusion and comment. With characteristic understatement it was said that the provisions of this deeming provision reflected ‘an unfortunate absence of clarity’.<sup>106</sup> In the first decision to consider the meaning of the section<sup>107</sup> the court simply equated the power to control the company with the power to control its shares, and being satisfied on the former count granted an order. The confusion between the two is clear from the statement in the judgment that:

‘In order to satisfy the requirements of the section [ie section 3(7)(a)(ii)], however, what must be established is that both companies are ‘controlled or owned’ by the same person (or persons).’<sup>108</sup>

Perhaps with a degree of prescience in the light of the subsequent amendments this rewrites the language of the section and replaces control of the shares of the company with control of the company itself. Having moved to more comfortable ground and avoided the conundrum posed by the difference in wording between the operative provision and the deeming provision related to it, the court held that the control contemplated by the deeming provision:

‘... relates to overall control, such as is exercisable for instance by a majority shareholder or his nominee, of the assets and destiny of the company; it does not refer to its day to day management and administration.’<sup>109</sup>

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<sup>105</sup> *Bocimar NV v Kotor Overseas Shipping Ltd*, *supra*, at 581 F-I.

<sup>106</sup> Shaw, *op cit*, 39-40. The offending provisions do however appear in this form in the draft bill forming part of the Law Commission Report

<sup>107</sup> *E E Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C). This has been described as the first case dealing with the arrest of an associated ship. See for example Staniland and McLennan, *The Arrest of an Associated Ship*, 1985 SALJ 148 but that is incorrect. It is the first reported judgment dealing with the requirements for association. The case of *The Berg* is undoubtedly prior in time in terms of when it was brought.

<sup>108</sup> At 326 I. Shaw, *op cit*, 39 draws attention to the erroneous approach in this case. He makes the point that control of the assets of the company is no more than evidence which may tend to show that a person controls the shares in the company.

<sup>109</sup> At 327 H- 328A.

As a preliminary description of the concept of control of a company this seems undoubtedly correct. The case was however unhelpful as a guide to the interpretation of a difficult section.

The problems posed by the section were first mentioned by Friedman JP<sup>110</sup> when he pointed out that:

‘It is possible for a person to control a company without necessarily controlling the shares in that company. For example, control over a company without a majority shareholding where voting rights are not commensurate with shareholding, or where ‘pyramiding’ takes place.’

To similar effect was a judgment of Magid J where he held that the fact that two ship-owning companies had common directors did not mean that the vessels were associated in terms of the Act and said:

‘If they had common directors, those directors, acting together would have controlled the management of the companies’ affairs. That is not however to say that they controlled the shares in the companies for there is a vast conceptual and factual difference between control of the management of a company’s affairs and control of the shares in that company; and, as appears clearly from s 3(7)(a)(ii) of the Act, the ownership [and control?] of shares is the sole criterion of association contained therein.’<sup>111</sup> (My insertion.)

Curiously the problem was resolved at the level of interpretation by a judgment that was delivered after the Act had been amended to resolve the issue by amending section 3(7)(a)(ii) to replace the reference to the ownership or control of shares in a company with a reference to control of the company itself. However it was still necessary for the court to consider the problem in a case that arose before the amendments. Its approach was to start with the provisions of section 3(7)(a)(ii) and to adopt the passages quoted above to make the point that there is a substantial difference between the control of shares in a company and the control of the company itself. Following upon that the court said:

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<sup>110</sup> In *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) 489 B-C, which was quoted with approval in *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) 485B.

'In its literal meaning para (b)(ii) does not perform any function. Unless therefore it is to be treated as *pro non scripto*, it should be interpreted as if it read:

'(ii) (A) person shall be deemed to control the shares of a company if he has the power, directly or indirectly, to control the shares in the company.'

Such an interpretation would complete what seems to be an ellipsis in para (b)(ii). And it would maintain the symmetry of para (a) of ss (7) (which deals with two factual situations (i) and (ii) and para (b) (which contains two deeming provisions (i) and (ii) for the purposes of para(a)).'<sup>112</sup>

As will be seen in due course the amendments to this section effected in 1992 rendered this area of dispute and the judgment academic.

A possible problem that did not, as it happens, arise in practice in applying these provisions, arose from the reference to control of the shares in a company. What if the company did not have shares as with a company limited by guarantee? In those circumstances the provisions of section 3(7)(a)(ii) could not apply as they depended upon control of the shares of the company and if the company had no shares it could not be applied. The suggestion that this could be resolved in part at least by reference to the definition of 'person' in the Interpretation Act<sup>113</sup> on the basis that a foreign company or one without shares is a person did not it is submitted assist. The effect of this would simply be that the ship-owning company would be owned by a person in the shape of a company not having shares. Unless one had the improbable situation that this company itself owned or controlled the shares in a company that owned the other relevant vessel, whether the ship concerned or the associated ship, the provisions could never find application. Whilst a theoretical possibility it was not a practical reality. After all if the one-ship-owning company did not have shares what was the likelihood of another ship-owning company in the same group having shares? This too was addressed by the amendments.

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<sup>111</sup> *East Cross Sea Transport Inc v Elgin Brown and Hamer (Pty) Ltd* 1992 (1) SA 102 (D) 107 E-F .

<sup>112</sup> *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas* 1995 (3) SA 112 (A) 119 G-I. Booysen, *South Africa's new Admiralty Act: A maritime disaster?* 1984 MBL 75 81.

(c) **When must the association exist?**

Whether vessels are associated for the purposes of the Act depends upon the relationship between their owners. However the Act did not initially spell out with any degree of clarity at what times the relevant requirements for association needed to exist. Section 3(7)(a)(i) described an associated ship as one:

‘... owned by the person who was the owner of the ship concerned *at the time when the maritime claim arose*’. (My emphasis.)

Accordingly the section clearly identified the relevant time as regards the ownership of the ship concerned. However it was silent in regard to the time when ownership of the putative associated ship was relevant. Was it the time of the arrest or the time when the claim arose or possibly both of these? The section dealt with sister ship arrests where the two vessels were in common ownership. If one examines the Arrest Convention and its background it seems clear that its intention was that the sister ship should, at the time of its arrest, be in the same ownership as the ship in respect of which the claim had arisen. That would be logical because the underlying principle of the Convention was that the shipowner was already liable *in personam* to pay the claim and all that claimants were permitted to do by the sister ship arrest provisions was arrest another vessel also owned by the same person. In other words the same person would remain liable but property owned by that person, other than the vessel in respect of which the claim had arisen, would be susceptible to arrest. That could only be achieved if the sister ship was one owned at the time of its arrest by the same person as had owned the ship concerned at the time that the claim arose. The same approach seemed appropriate in regard to the time when ownership of the associated ship had to be established.

This understanding of section 3(7)(a)(i) accords with that of the draftsman of the Act. Shaw wrote in regard to it that:

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<sup>113</sup> Shaw, *op cit*, 39. Section 2 of Act 33 of 1957.

‘As has been suggested with regard to the action in rem against the ship concerned, the phrase ‘owned by the person’ means ‘owned by the person at the time of the arrest’. If therefore, A, at the relevant time (that is at the time of the arrest) owns a ship, that ship will be an associated ship if A, at the time when the maritime claim arose, was the owner of the ship concerned. Changes of ownership in the ship concerned after the time when the maritime claim arose are irrelevant, as is the question whether the ship which is an associated ship was owned by A at the time when the maritime claim arose.’<sup>114</sup>

No issue ever arose in regard to this provision and in the court *a quo* in the *Berg* it seems, albeit much in passing, to have been accepted as self-evident.<sup>115</sup> It accorded with the provisions of article 3(1) of the Arrest Convention, which had been worded in this way to ensure that the situation could not arise where a person purchased a vessel subject to a maritime lien and thereby rendered his entire fleet liable to arrest as sister ships of the newly acquired vessel.<sup>116</sup> The same protection was given to shipowners in relation to the possibility of having their vessels arrested as associated ships.

Section 3(7)(a)(ii) likewise identified the time when the maritime claim arose as being the relevant time insofar as the time when ownership or control of the shares in the ship-owning company had to exist. However it was not silent in respect of the time when the shares in the company owning the putative associated ship had to be owned or controlled. The section read:

‘... owned by a company in which the shares, *when the maritime claim arose*, were controlled or owned by a person who *then* controlled or owned the shares in the company which owned the ship concerned.’ (My emphasis.)

This language seemed to refer back to the time when the maritime claim arose as being the time when ownership or control of the shares in the company owning the associated ship had to be determined.<sup>117</sup> This created an anomaly between the position when ownership of the two ships

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<sup>114</sup> Shaw, *op cit*, 37-8. Booysen, *op cit*, 81 had already made the point that ‘Of cardinal importance is that ship B, the associated ship, must be owned by X when the action is instituted.’

<sup>115</sup> NPD judgment 662 C-D.

<sup>116</sup> Berlingieri, *Arrest of Ships*, 4th Ed, 158, para 52.429.

<sup>117</sup> That was said to be its effect in *National Iranian Tanker Co v MV Pericles* CC 1995 (1) SA 475 (A)

was the criterion for association and that where ownership or control of the shares in the two ship-owning companies was concerned because the time for association was different. In the former case the relevant time for ownership of the associated ship was the time of the vessel's arrest. In the latter the relevant time for ownership or control of the shares in the company owning the associated ship was the time when the maritime claim arose. That also seemed inconsistent with the explanation of the purpose of the section given to the Appellate Division in the *Berg*<sup>118</sup> namely that:

‘... the purpose of the Act was to make the loss fall where it belonged by reason of ownership, and in the case of a company, ownership or control of shares.’

The problem, as pointed out by Professor Booysen<sup>119</sup>, was that the section merely required the shares in the company owning the associated ship to have been owned or controlled at the time the maritime claim arose by the person who then owned or controlled the shares in the company owning the ship concerned. In the result there was no need at that time for the company owning the associate ship to own any ship at all nor any need at the time of the arrest for the person who owned or controlled the shares at that time to have any remaining interest in the company owning the associated ship:

‘What is important is that both companies eg Y and Z, must have been owned by the same person (X) when the claim arose. If X owns or controls the two companies Y and Z, and Y is involved in shipping and Z not, it does not matter that Z did not even have a ship when Y's ship, eg, caused damage by collision. Even if Z acquires a ship after the claim arises, that ship can still be arrested as an associated ship in an action *in rem*. The only way X can protect his other ships is to sell them to companies established after the original cause of action arose. Even if X sells his shares in company Z after the claim arises and company Z then goes into shipping and acquires a ship, that ship will also be liable to attachment as an associated ship.’<sup>120</sup>

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<sup>118</sup> AD judgment 712A.

<sup>119</sup> Booysen, *op cit*, 81.

<sup>120</sup> Booysen, *op cit*, 81-2. Staniland and McLennan, 1985 SALJ 148 151 question whether Professor Booysen's example is correct as an instance of association on the basis that the word 'owned' in section 3(7)(a)(ii) can be interpreted in both the present and the past tenses. That does not appear to be correct linguistically or grammatically. The section deals with the arrest of an associated ship. The preamble to section 3(7) is in the present tense - 'an



The possibility of a person owning a company that does not own a ship and then using that company to acquire a ship is fortunately relatively remote. It is an even more remote possibility that X should dispose of the company that does not own a ship to a person who would then acquire a ship using that company. However the possibility of the shares in a ship-owning company being disposed of after a maritime claim arises to a person having no connection with the company owning the vessel in respect of which the claim arose is at least real, if somewhat unusual, particularly if there is a significant time lapse between the date on which the claim arises and the date of the arrest. The result would be that association would not result in the liability for the claim falling upon those standing behind the company that is the original debtor.<sup>121</sup>

Potentially an even more eccentric result was possible. If a claim arose in respect of ship A owned by X and X was unwise enough thereafter to acquire ship B, then on such acquisition ship B would become an associated ship in relation to ship A. That was exactly what the draftsman had in mind as it would cause the loss to fall on X. However if X chose to acquire ship B through a newly formed company Y, in which X held all the shares, then there would be no association because the company Y would not have been in existence when the claim arose in relation to A.

Fortunately the problem does not appear to have been significant in practice in that there is only one reported case in which such a situation arose.<sup>122</sup> One commentator noted that it was a situation that could lead to hardship and suggested that consideration should be given to

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associated ship **means** a ship ... owned.' It is difficult in those circumstances to treat the word 'owned' as being couched in the past tense or relating to any time other than the time that the arrest is sought.

<sup>121</sup> This is the effect of the example set out in the AD judgment in the *Berg* 712G - 713A. Indeed unless one understands that this was the original effect of section 3(7)(a)(ii) it is difficult to see why the court should have thought that this was a case of an associated ship at all.

<sup>122</sup> *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C). In this case the original arrest of the vessel had been set aside on the basis that the vessels were not associated at the date of the arbitration award on which the arrest was originally founded. *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) 489 F - 490A. Whilst the argument in that case was underway the vessel was again arrested but in this instance on the basis of the underlying claims giving rise to the arbitration and not on the award. The arrest was upheld because it was common cause that at the time the underlying claims arose the vessels were associated ships. In other words reliance was placed on the provisions of section 3(7)(a)(ii) that made the time for association when the maritime claim arose and not when the arrest was effected. Had consideration been given to the question of retrospectivity both arrests should have been refused. See footnote 123, *post*.

providing some form of protection for *bona fide* purchasers of vessels liable to be arrested as associated ships.<sup>123</sup> Clearly the situation was not one that could be permitted to continue and it was remedied in 1992 by way of the amendments to the Act that altered the relevant time under section 3(7)(a)(ii) to the date of arrest thereby harmonising the two sections.

**(d) Proof of association**

From the outset proof of association has never been easy particularly as this has ordinarily fallen for consideration on affidavit in opposed motion proceedings and not in trials. In such proceedings the applicant is usually confronted by the difficulty that it does not have access to the internal workings of the relevant companies or group of companies. Obviously there are many shipping groups that operate their fleets through a series of one-ship companies that are relatively public in advertising this fact. The vessels operate as part of a single fleet, with the same manager, and whilst the ship-owning companies are registered in flag of convenience states there is often no secret about the ultimate ownership and control of those companies and the shares in those companies. However it is not usually such groups that become involved in litigation requiring the invocation of the associated ship jurisdiction. The more frequent situation relates to fleets in financial difficulty or those that are operating on a shoestring budget and concerned to avoid paying their debts if they can do so. In those situations it is usually the case that their operations are deliberately shrouded in secrecy so that few details of the ownership and control of such fleets are available in the public domain. The companies owning the ships are invariably incorporated in countries where information concerning their shareholders is not readily available either because of the use of bearer shares or because the shares are registered in the name of nominees.<sup>124</sup> In the result at the inception of the jurisdiction, when what had to be shown was

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<sup>123</sup> Friedman J in 1986 SALJ 678 686.

<sup>124</sup> Hurt J commented in a case involving the *MV Sandokan*, Case No A166/2001, DCLD, SCOSA B171, that; ‘The whole enterprise of ship ownership and control has become pervaded by efforts to set up a *de jure* picture that *de facto* shields a person in control from numerous liabilities... The contest between creditors and owners ... often devolves into one of searching through the records of a series of companies that are interposed between the ship itself and the actual source of control. Once the veil has been slashed one often finds nominee shareholders who are more

common ownership or control of shares rather than control of a company, it was fairly easy to overcome reasonably compelling circumstantial evidence of a link between two companies by a bald assertion that the shares in the two companies were owned by different - although often closely connected - individuals.<sup>125</sup>

The position of the applicant for an arrest is ameliorated to some extent by the provisions of section 6(3) of the Act that permit hearsay evidence to be admitted 'subject to such directions and conditions as the court thinks fit' and on the basis that the weight to be attached to such evidence is in the discretion of the court. An initial attempt to restrict the scope of this provision to urgent cases where the original source of the information embodied in the hearsay evidence is identified was rejected by the appeal court. It held that the proper approach to the admissibility of hearsay evidence is to be lenient, so that in general the court inclines to admitting it and a decision to exclude it should only be taken when there is some cogent reason for doing so.<sup>126</sup> The court assesses the weight to be given to such evidence when considering the case in its totality. Since that decision there does not appear to be any case where the court has excluded hearsay evidence although there are decisions where it has given it very little weight because it has been shown to be unreliable.<sup>127</sup> The result has been that information culled from publications such as Lloyds' List or Fairplay and reports on shipping groups by organisations that specialise in providing information, usually of a financial nature, are frequently relied on by the courts in cases where the question of association is under consideration. However this does not necessarily overcome the problems of peering behind anonymous share registers reflecting that a company's shares are

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often than not legal practitioners. Therefore a person trying to recover a debt based on the common control must often end up having to make an educated and calculated guess as to the person in control.'

<sup>125</sup> As occurred in *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C). The case had a curious sequel in that before the arrest had been set aside in terms of that judgment the vessel had been arrested again and that subsequent arrest was upheld. *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C). In fact neither arrest should have been granted in the light of the decision in the *Berg* that these provisions were not retrospective but that point was not apparently raised. The NPD judgment in the *Berg* was only reported after both judgments in the *Zygos* cases had been delivered. See Friedman J in 1986 SALJ 678 685.

<sup>126</sup> *Cargo laden and lately laden on board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) 842 F-H.

all bearer shares or discovering who is the puppet-master behind a company all of whose directors and officers are nominees employed by a legal firm in Panama or Cyprus.<sup>128</sup>

In view of this difficulty it was suggested fairly shortly after the Act came into operation that the problem needed to be addressed by way of the introduction of a statutory presumption. The suggestion came from Friedman J who said:

‘Of more importance, I think, is the incorporation of some presumption. Whilst in general I am opposed to presumptions that alter the normal incidence of proof, it may be unavoidable if the ‘associated ship’ provisions are to be given proper efficacy. In the final analysis, whether or not control resides in a particular person is a question of fact, and very often the real facts will only be known to those who are the respondents in such proceedings. Such was the position in the *Zygos Corporation* case, where the result, whilst probably correct, may nevertheless have been unfortunate.’<sup>129</sup>

However nothing has ever come of this suggestion and the immediate difficulty with it lies in determining what presumption would be appropriate. The situations in which an association is alleged are so disparate that it is difficult to conceive of a presumption that would be both generally applicable and fair to all potential respondents. Presumably what Friedman J had in mind was some sort of presumption that ships are associated or shares in ship-owning companies are owned or controlled by the same person or persons once certain primary facts have been proved by the party seeking arrest. Whilst there is a certain attraction to having a presumption that assists an applicant for arrest in circumstances where the inner workings of a group of

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<sup>127</sup> See for example *MV Achilleus v Thai United Insurance Company Limited* 1992 (1) SA 324 (N) where some hearsay evidence was accepted and other hearsay evidence rejected on questions of the genuineness of certain bills of lading.

<sup>128</sup> This very difficulty appears to have underpinned the approach of the majority of the court in *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA), a decision that will be considered in much greater detail at a later stage

<sup>129</sup> Friedman J, *op cit*, 685. In an unreported judgment in *Ssang Yong Shipping Co Ltd and another v MV Theokeetor*, A51/1987 (DCLD), SCOSA C81, Wilson J remarked that: ‘It may well be ... with the ship registered in a jurisdiction where outsiders are unable to obtain information as to the ownership of the company that it would be desirable that the legislature take steps to ensure that vessels that venture into the jurisdiction of these courts are obliged to provide information in proper circumstances as to the shareholding of the company which is the owner of the vessel.’ That was a case where the shareholder in the company that owned the ship in respect of which the claim arose deposed to no affidavit although a representative of the ship’s agent did so.

companies is kept deliberately opaque and it is not possible to obtain information about such workings, the drafting of an appropriate presumption is fraught with difficulty if not impossible. Perhaps for that reason the suggestion has never been taken further. It would be preferable in my view for the court to adopt a more generous approach to referring these matters for evidence or requiring discovery the effect of which is almost certainly going to be that dishonest denials of an association will be exposed.

It is debatable whether the original deeming provisions in sections 3(7)(b) and (c) of the Act were particularly useful to an applicant in proving an association. They read as follows:

- ‘(b) For the purposes of paragraph (a) -
- (i) ships shall be deemed to be owned by the same persons if all the shares in the ship are owned by the same persons;
- (ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.
- (c) If a charterer or sub-charterer of a ship by demise, and not the owner thereof, is alleged to be liable in respect of a maritime claim, the charterer or sub-charterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner.’

The first of these was relevant to the association in the case of sister ships and is taken from article 3.2 of the Arrest Convention. As has already been noted that has not proved to be a problematic area and there is no reported case in which it has been necessary to have resort to this presumption.

The second deeming provision has been extensively discussed above<sup>130</sup> and it is unnecessary to canvass it further in any great detail. In view of the confusion that it engendered it was of hardly any assistance in proving an association. When authoritatively interpreted it was said that words had to be read into the section so that it read as if it referred to control of the shares of the company rather than control of the company itself. As the presumption was left unchanged by the subsequent amendments to this section that approach is no longer valid and it provides a curious example of a section in a statute changing its meaning without changing its

wording. It is only as a result of this change in meaning that the issues that arise from the references to ‘direct’ and ‘indirect’ control<sup>131</sup> of a company have arisen subsequently.

The third deeming provision is clearly unrelated to any issue of proving an association. Its function is to extend the scope of the action *in rem* commenced by the arrest of an associated ship. That it does in relation to the demise charterer but it has no application in any other situation and does not bear upon the problems of proof facing an applicant for arrest.

Notwithstanding these difficulties it would be an overstatement to say that the dice are so loaded against those claimants who seek to enforce their claims by way of an action *in rem* against an associated ship that the remedy is virtually an empty one. There is always some evidence available to a claimant and as long as it can produce enough to constitute at least a *prima facie* case of association that will suffice to force the owners of the two vessels to produce in response some direct evidence that they are not in truth associated. Sometimes the applicant’s task is relatively straightforward as when an investigation of the ship-owning companies reveals that they have the same shareholders (albeit nominees) and the same directors or where there are proven financial links between the two companies in the form of common borrowing or cross-mortgages or cross-guarantees. In the absence of countervailing evidence from the owners of the shares in the ship-owning companies that will usually suffice to discharge the onus of proof on the claimant even in the face of a bare denial of the fact of association. This flows from the well-established principle that less evidence will be required to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party.<sup>132</sup> A passive approach of simply not responding to allegations of fact pointing towards common control of the shares of two ship-owning companies was adopted unsuccessfully in an early case where the deponent to the opposing affidavit declined to deal with the question of control over the shares of the company

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<sup>130</sup> Para (b), *sv* ‘Control’, *supra*.

<sup>131</sup> *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

<sup>132</sup> *Union Government (Minister of Railways) v Sykes* 1913 AD 156, 173-4; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 39G-H.

that owned the ship concerned. The approach adopted was to say that the opposing affidavit had been delivered ‘in the nature of an exception’. However the court held that the failure to advance a positive denial that a named individual was the person who owned or controlled the shares in the company that owned the putative associated ship was sufficient to tip the balance in favour of the claimant.<sup>133</sup>

That was a special case in the light of the complete failure of the ship-owner to deny any of the allegations made against it or to make any positive case concerning the ownership or control of its shares or even to deny that they were owned by the person identified by the claimant. Experience suggests that such a stance is rare and in that case it was borne of an inability truthfully to deny the existence of an association. There are however a number of cases where the court has, notwithstanding opposition, held that an applicant has discharged the onus of proving an association on a balance of probabilities. Unfortunately all these cases are unreported<sup>134</sup> but a common thread running through several of the judgments is that the court rejected as unconvincing and not raising any significant dispute of fact the case made on behalf of the respondent ship-owner. In other words the court has adopted the ordinary approach in opposed applications where it is not satisfied that bare denials or general explanations are sufficient to raise a genuine dispute of fact.<sup>135</sup>

In other cases where there has been a failure to prove the existence of the association the applicant has invariably been confronted with positive evidence dealing with the crucial questions of control of the shares in the company (prior to the 1992 amendments) or control of the

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<sup>133</sup> *Hasselbacher Papier Import and Export (Body Corporate) and another v MV Stavroula* 1987 (1) SA 75 (C)

<sup>134</sup> Examples are *MV Bacanao: Transportes del Mar SA v Jay Bay Shipping Co Ltd*, A119/95 (DCLD), SCOSA C42; *MV Ain Temouchent: Keytrade USA Inc v MV Djouf*, A 135/2001 (DCLD), SCOSA B160; *The Able Monarch: Prestige Splendour SDN BHD v Globe Engineering Namibia (Pty) Ltd*, AR 249/2001 (DCLD) B135 and *Chester Shipping Company v Rifino Shipping Company Limited* AR 24/2005 (DCLD).

<sup>135</sup> *Peterson v Cuthbert & Co Ltd* 1945 AD 420, 428; *Da Mata v Otto NO* 1972 (3) SA 858 (A) 865I-866A.

company itself (after the 1992 amendments).<sup>136</sup> The problem with such evidence has often lain in the reluctance of the respondents in those proceedings to produce documents that would decisively demonstrate the truth of their allegations or refute them. This has lead in several cases to applications either for discovery or for the issue of association to be referred for the hearing of oral evidence. It appears from the reported cases that applications for discovery have invariably failed.<sup>137</sup> The courts have also exhibited a clear reluctance to refer questions of association for the hearing of oral evidence.<sup>138</sup> Whatever the merits of the decisions in those cases it is submitted that the particular ground upon which that has usually been done, namely that this is a preliminary question of jurisdiction, is erroneous for the reasons given when dealing with the question of onus and that this is not a factor that should influence a court asked to grant such an order.

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<sup>136</sup> Thus in *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) there was a substantial body of evidence dealing with the circumstances of certain financial transactions that lead to the vessels no longer being associated albeit relatively unsupported by documents. In *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D) the question of ownership and control was fully dealt with albeit again without the production of documentary evidence.

<sup>137</sup> See *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D); *East Cross Sea Transport Inc v Elgin Brown and Hamer (Pty) Ltd* 1992 (1) SA 102 (D); *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia)* 1999 (3) SA 500 (C) 513E-I and *MV Rizcun Trader (2): Manley Appledore Shipping Ltd v Owner of the MV Rizcun Trader and another* 1999 (3) SA 956 (C). In the latter two cases where discovery was sought before the delivery of all the affidavits the court held that exceptional circumstances needed to be present before making such an order. There is one unreported case in which the court ordered production of a document, namely *The Voyager V: Mesogea SA v MV Voyager V (ex 'Hanjin Jedda')*, A 186/2000 (DCLD), SCOSA E90 but in that case the document in question had been specifically mentioned in the answering affidavit and its production was sought in terms of rule 35 (12) of the High Court Rules. Litigants who are alive to the provisions of this rule are careful not to mention specific documents in their affidavits.

<sup>138</sup> *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C). There is only one case of which I am aware in which the question of association was determined after a full trial and that is the unreported judgment in *Kherson Shipyards v MV Als Express and others* A55/2001 (DCLD), SCOSA C97. There however the defendant put up a letter of undertaking to secure the release of the vessel and the matter then proceeded to trial. The case illustrates that even a trial will not necessarily reveal the true position as the court granted absolution from the instance and made no order as to the costs of the action on the grounds that it was left with a 'lingering suspicion that I have not heard the full truth'. In *MV Kadirga 5: J A Chapman & Co Ltd (in liquidation) v Kadirga Denizcilik ve Ticaret SA* AR115/98 (NPD), SCOSA C12, the court referred the issue of association for the hearing of oral evidence because it was unable on the papers to reject the denials of an association on the part of the Respondent. It is clear from the judgment however that it regarded the probabilities on the papers as strongly favouring the applicant. A similar course was adopted in *The Leros Strength; Roza v MV Progress; MV Progress v Stone Engineering Ltd* SCOSA C20. An



It is submitted that the court should consider such applications in the same way in which it would deal with similar applications in any other field of the law. In other words the court has a discretion whether to order oral evidence. Two factors are of importance in this regard. The first is the nature of the proceedings in which this arises as an issue. If it arises in an application to obtain security for foreign proceedings then the proceedings are interim proceedings in the sense that they do not resolve any issue between the parties other than the question whether the applicant will have security for its claim in the foreign proceedings. In such a case there is authority that the court will be slow to order that oral evidence be heard because it may involve the vessel being detained or at least the costs of security being furnished whilst the parties litigate over an issue that cannot directly resolve the dispute between them.<sup>139</sup> That should be seen subject to the qualification that if the issue on which evidence could be taken is a narrow one and the evidence readily available the factors of inconvenience, delay and expense will diminish and other factors such as the likelihood of that evidence resolving matters in favour of the applicant will assume greater significance. The court should bear in mind the possibility of giving directions for the expeditious hearing of the case that will obviate delays.

Where the question of association arises in an application to set aside an arrest that commences an action *in rem* to be pursued in the local court then these factors of inconvenience and delay are of far less importance. In those situations it is submitted that if the probabilities on the papers support the applicant's contention that an association exists or are evenly balanced then the court should generally exercise its discretion in favour of a reference to oral evidence or trial or should order the production of any document which by its nature is likely to be decisive of the issue. If the probabilities are evenly balanced or even against the applicant then the exercise of the court's discretion will depend upon the prospects of the hearing of oral evidence disturbing

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examination of a number of unreported judgments suggests that applications to refer them for the hearing of oral evidence on questions of association are infrequent.

<sup>139</sup> *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) 586; *MV Alam Tenggiri: Alam Tenggiri SDN BHD and another v Golden Seabird Maritime Inc and another*, A 243/98 (DCLD), SCOSA B25; *MV Alam Tenggiri: Golden Seabird Maritime Inc and another v Alam Tenggiri SDN BHD and another* 2001 (4) SA 1329 (SCA), para 21.

that balance in favour of the applicant.<sup>140</sup> It is legitimate for the court to have regard to the prejudice that the respondent ship-owner may suffer if the arrest is permitted to continue pending the hearing of evidence. On the other hand the failure of a ship-owner to put relevant and potentially decisive documents before the court; the absence of direct evidence concerning the ownership and control of a ship-owning company and the fact that the material facts may well not be in the public domain should weigh heavily in favour of an applicant seeking a reference to oral evidence.

## 5 CONCLUSION

The decisions by the courts in the first ten years after the Act came into operation established certain principles in relation to associated ships. Of these the most important is that the action instituted by the arrest of an associated ship is an action *in rem* against the associated ship itself and not merely an action *in rem* against the ship concerned instituted by way of the procedure of arresting the associated ship. The implications of that still need to be examined and have not been further explored in the cases. It does however have implications for the adoption of either the English procedural theory of the action *in rem* or the American personification theory, at least in their purest form. The reason for the former is that it is based upon an acceptance that the availability of the right of arrest creates new rights and imposes new obligations of a substantive nature. This involves a rejection of the proposition that this is achieved merely as a matter of procedure. The reason for the latter is that the personification theory at the least flows from the notion that the vessel itself is in some way the instrumentality through which the liability is created a matter that is tied to the American concept that the foundation of the action *in rem* is the existence of a maritime lien over the property that is the subject of the action. It is for this reason that the United States does not recognise the sister ship arrest of the Arrest Convention. The associated ship is an even more remote concept. To apply a

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<sup>140</sup> *Kalil v Decotex (Pty) Ltd and others* 1988 (1) SA 943 (A) 979A-C; *Wiese v Joubert* 1983 (4) SA 182 (O) 202 B-C; *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) 497I. The case of *Ssang Yong Shipping Co Ltd and another v MV Theokeetor*, A51/1987 (DCLD) referred to in footnote 127 is a prime example of a case where a reference to oral evidence would have been justified if it had been asked for.

personification theory to the action *in rem* against the associated ship is to deprive the theory of any conceptual foundation and reduce it to the obvious statement that the action is in form said to lie against the ship.

The other important principles established initially and still of application relate to evidential matters. They are that the onus of proving association must be discharged on a balance of probability and that hearsay evidence is generally admissible and not confined to cases of urgency. Cases on these topics are therefore still applicable notwithstanding the amendments effected in 1992. In approaching cases where there is a dispute of fact on the papers the court's approach is no different from that applied in all other applications, save that the cases reflect a reluctance to order the production of documents or a reference of disputed issues to oral evidence.

Apart from these matters the principal difficulties with the new regime related to the time at which the association between the ship concerned and the putative associated ship had to exist and the fact that in the case of companies it was ownership or control of the shares in the company rather than control of the company itself that was relevant to the existence of an association. These were matters that were addressed when the Act was amended in 1992. So were other possible problems that had not arisen in practice such as the fact that in its original form the Act did not appear to allow for a situation where the association was sought to be demonstrated in a situation where the ship concerned was owned by a natural person, A, who was the owner of the shares in the company that owned the putative associated ship. Whilst this apparently gaping *lacuna* could possibly have been filled by a process of interpretation<sup>141</sup> it was more readily dealt with by way of an amendment. By the time the amending statute was passed the implementation of the associated ship jurisdiction over a reasonably substantial period had highlighted potential and actual anomalies; areas where it was appropriate to extend the scope of the jurisdiction as well as areas of the Act unrelated to the question of an associated ship where practical experience

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<sup>141</sup> See *Summit Industrial Corporation v Claimants against the Fund comprising the proceeds of the sale of the MV Jade Transporter* 1987 (2) SA 583 (A) 590.

suggested that amendment was necessary. As with the initial formulation of the Act a wide-ranging debate took place within the ranks of the members of the Maritime Law Association. The end result was the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992 ('the Amending Act'), which came into effect from the 1<sup>st</sup> July 1992. The amendments brought about by the Amending Act brought the associated ship provisions of the Act into their present form. That is what will now be considered.

## CHAPTER 6

### **THE AMENDMENTS AND THE PRESENT ASSOCIATED SHIP JURISDICTION**

#### **1 BACKGROUND TO THE AMENDMENTS**

The two major innovations of the Act, namely the provisions for the arrest of associated ships and the security arrest under section 5(3), proved to be extremely attractive to foreign claimants and brought an immediate upsurge in maritime litigation in South Africa. It must be emphasised that in most instances the invocation of these provisions posed no problems of interpretation or application and - at least from the perspective of claimants, if not from that of aggrieved shipowners whose vessels were the targets of such proceedings - provoked no particular controversy. However, as noted in the previous chapter certain areas posing potential difficulties were identified at an early stage in relation to the associated ship arrest provisions. This alone would probably not have prompted any great pressure for the Act to be amended. What did was the litigation arising out of the collapse of a single shipping group that occurred at a very early stage of the life of the Act. No less than four vessels were arrested and sold in terms of orders granted under section 9 of the Act. The resultant funds in court fell to be distributed in accordance with the order of priorities prescribed in section 11 of the Act. The application of these provisions in regard to the distribution of funds was highly controversial and hotly disputed.<sup>1</sup> Much of this litigation was around the appropriate treatment of the novel institution of associated ships and, as will be seen, it played an important role in bringing about the

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<sup>1</sup> The three principal reported judgments are *Banque Paribas v The Fund Comprising Proceeds of Sale of the m.v. 'Emerald Transporter'* 1985 (2) SA 452 (D); *Gulf Oil Trading Company and others v the Fund Comprising the Proceeds of the Sale of the m.v. 'Emerald Transporter'*; *Irving Trust Co. v Gulf Oil Trading Co. and others*; *The Gulf Oil Trading Co and others v The Fund Comprising the Proceeds of the Sale of the m.v. 'Jade Transporter'* 1985 (4) SA 130 (N) and *Summit Industrial Corporation v Claimants Against the Fund Comprising of the Proceeds of the Sale of the m.v. 'Jade Transporter'* 1987 (2) SA 583 (A). Related separate issues were canvassed in *Petjalis Engineering Works (Pty) Ltd v South African Transport Services* 1985 (1) SA 787 (C).

amendments to the Act that occurred in 1992.<sup>2</sup> It is accordingly necessary to make some reference to it.

The order of priorities in the distribution of a fund in court in terms of the Act is prescribed under section 11 of the Act. One result of introducing the concept of associated ships was that claims against the fund would include not only claims arising from the operation and activities of the vessel that had been sold but also claims arising from the operation and activities of other vessels in relation to which it was an associated ship. It was accordingly necessary in setting out the statutory scheme for the distribution of a fund to deal with situations where the claims against the fund were both direct, that is arising from the operations and activities of the vessel itself, and indirect, that is claims that had nothing to do with the operations and activities of that vessel but were being pursued against the fund because it was an associated ship in relation to the vessels in respect of which those claims had arisen. In the result section 11(8) of the Act provided that:-

‘Where the fund arises by reason of an action *in rem* against an associated ship, the ranking of claims set out in this section shall, notwithstanding the provisions of section 3(6), apply with regard to claims in respect of the associated ship, and claims in respect of the ship concerned shall be paid thereafter in the order set out in this section.’

It seems probable that the initial understanding of this section was as clear and simple as it appeared to Milne JP in the case of *The Berg*.<sup>3</sup> Having set out the section Milne JP went on to say:-

‘In my view the meaning of this section is quite clear. It is that, notwithstanding that s3(6) gives the right to a marine claimant to bring an action *in rem* by the arrest of an associated ship instead of the ship in respect of which the marine claim arose, claims of the nature described in ss(1) of s11, which lie against the associated ship, are to be paid in preference to claims which lie against the associated ship by reason of the provisions of s3(6). In other words, claims which lie directly against the associated ship have preference over claims for which it is, as it were, vicariously liable.’<sup>4</sup>

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<sup>2</sup> In terms of the Admiralty Jurisdiction Regulation Amendment Act, 87 of 1992.

<sup>3</sup> *Euromarine International of Mauren v The Ship ‘Berg’ and others* 1984 (4) SA 642 (N).

<sup>4</sup> At 656F-H.

Having dealt with another submission Milne JP summarised his conclusion as follows:-

‘... in my view, the ordinary meaning of the words ... [is that] where a ship is sued as an associated ship in terms of s3(6), the ranking of claims set out in ss(1) apply (*sic*) firstly with regard to those claims which arise primarily against the associated ship itself and only thereafter will claims in respect of its vicarious liability be met.’<sup>5</sup>

However, when the proper interpretation of section 11(8) arose in practical circumstances where the effect of the interpretation would determine whether and to what extent particular claims against funds would be paid the language of the section was placed under the microscope and the wording proved not to be entirely felicitous. Notwithstanding that its proper interpretation had initially seemed clear it was subsequently noted, somewhat ruefully, that the provisions ‘have given rise to not inconsiderable difficulty’.<sup>6</sup>

In view of the subsequent amendments to the section it is not necessary to expand in detail upon the litigation surrounding section 11(8) save to say that the rival contentions revolved around three questions. The primary question, although never posed as such, was whether section 11(8) provided a comprehensive answer to the issue of the proper ranking of direct and indirect claims in all possible situations?<sup>7</sup> The second question was whether a distinction fell to be drawn between associated ship claims brought against sister ships under section 3(7)(a)(i) of the Act and those brought against true associated ships under section 3(7)(a)(ii) of the Act, on the basis that sister ship claims could be pursued by way of a direct action *in personam* commenced

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<sup>5</sup> At 657C-D.

<sup>6</sup> Shaw, *Admiralty Jurisdiction and Practice in South Africa*, 99.

<sup>7</sup> That was clearly the view of Milne JP in ‘*The Berg*’, *supra* and it was the view of the Full Bench in *Gulf Oil Trading Company and others v The Fund Comprising the Proceeds of the Sale of the m.v. ‘Emerald Transporter’* 1985 (4) SA 133 (N) that this was the intention. Howard J said (at 139H): ‘To achieve the apparent object for which it was enacted, the subsection should have been made applicable whenever the claims against a fund include an enforceable associated ship claim.’ Although that was the apparent intention of the section Howard J concluded (at 140E-F) that: ‘My construction of s11(8) does not cater for that contingency: it does not render the subsection applicable in all cases where the claims against a fund include one or more associated ship claims, and accordingly falls short of realising what I conceive to be the object for which the subsection was enacted. As already indicated, however, that is a shortcoming that only the Legislature can rectify.’

by the attachment of the vessel *ad fundandam et confirmandam jurisdictionem*, without having resort to the associated ship jurisdiction.<sup>8</sup> The third question was the meaning to be attached to the rather cryptic opening words of the section namely: ‘Where the fund arises by reason of an action *in rem* against an associated ship.’ Indeed, it was the cryptic nature of these words that largely occasioned the primary problem of whether the section applied in all possible circumstances.

In order to arrive at any reasonably satisfactory solution to the problems occasioned by the language of the section resort was had to the principle of interpretation that the court is entitled to depart from the literal meaning of words in a section in order to give effect to the legislature’s clearly expressed intention.<sup>9</sup> However, when the interpretation of section 11(8) came before the Appellate Division<sup>10</sup> it held that a departure from what it described as ‘the literal meaning’ was impermissible.<sup>11</sup> The result of this decision was to throw the entire question of the distribution of

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<sup>8</sup> Wilson J had recognised a distinction between the two types of claim for the purpose of retrospectivity in *Banque Paribas v The Fund Comprising the Proceeds of Sale of the m.v. ‘Emerald Transporter’* 1985 (2) SA 442 (D) 460. However, in the appeal from that judgment in *Gulf Oil Trading Co. and others v The Fund Comprising the Proceeds of the Sale of the m.v. ‘Emerald Transporter’*, *supra*, 141F-J the Full Court rejected the contention that in the ranking of claims a distinction fell to be drawn between the two different types of associated ship claims. That was upheld by the Appellate Division in *Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the m.v. ‘Jade Transporter’* 1987 (2) SA 583 (A).

<sup>9</sup> *R v Venter* 1907 TS 910 at 914-5; *Van den Berg v Direkteur van Ekonomiese Sake* 1983 (1) SA 106 (A) 117A-B.

<sup>10</sup> *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the m.v. ‘Jade Transporter’*, *supra*.

<sup>11</sup> In a passage in the judgment remarkable for its non-literal approach to the ‘literal’ meaning of the preamble Corbett CJ said: ‘It was argued by counsel for *Summit*... that a fund could not properly be described as arising ‘by reason of an action *in rem*’. In my view, there is no substance in this argument. The phrase ‘by reason of’ ... indicates a causal relationship between the arising of the fund and the action *in rem* taken against an associated ship ... It is true that the institution of an action *in rem* does not, *per se*, give rise to a fund in the Court. For a fund in the Court to be created the Court must make an appropriate order in terms of s 9 for the sale of the ship and the holding of the proceeds of the sale as such a fund; and in pursuance thereof the sale must take place and the proceeds duly held as a fund in the Court. Plainly the Legislature was aware of this and consequently the words of the preamble to s 11(8) must be interpreted as contemplating a chain of causation consisting basically of (i) the institution of an action *in rem* by the arrest of an associated ship, (ii) an application to Court in terms of s 9 for the sale of the arrested ship and the holding of the proceeds of the sale as a fund in the Court, (iii) an order of court granting the application, (iv) the sale of the ship and (v) the holding of the proceeds of the sale as a fund in the Court. Admittedly the precise nature of the causal connection between links (i) and (ii) is a matter upon which the subsection is not clear.’ (At 595-6). On the basis of this very considerable extension of the language of the preamble he went on to say (at 597B-D): ‘I



funds into a state of confusion and raise again the spectre that had haunted the dual jurisdiction prior to the commencement of the Act of the priority of claims being determined by random factors such as the identity of the party seeking an order for the sale of a vessel under section 9 and the nature of the claim upon which that party founded its application for the sale of a vessel. Manifestly this was an intolerable situation and it precipitated the need for the Act to be amended. In the process the opportunity was taken to consider all the potential problems that had been identified in its operation as well as to build upon its advantages. The result was that in 1992 substantial amendments were effected to the Act.<sup>12</sup>

In the course of making the amendments that were needed to section 11 it was sensible to review the entire Act now that it had come into operation and address issues that had arisen in the initial years. At the same time possible difficulties that had not yet manifested themselves in practice, but had been identified in academic writing and by the principal draftsman of the Act, Douglas Shaw QC, in his own book on the subject, could be dealt with and the problems avoided. What followed was an overall process of scrutinising the Act and identifying the teething problems that had arisen in which once again the Maritime Law Association took the lead. The result was a significant revision that not only eliminated some gaps but also broadened and extended the entire scope of the associated ship provisions. Each of the problems noted in chapter 5 was addressed in the amendments. In addition other amendments were made, either specifically to section 3(7) where the associated ship is defined, or elsewhere in the Act in

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do not think that a departure from the literal meaning of the preamble to s11(8) is justified. Giving the words their literal meaning does not lead to any absurdity. It brings about a 'queuing' in the very circumstances obviously intended by the Legislature, i.e. where a fund in the Court arises 'by reason of' (i.e. in the manner indicated above) an action *in rem* against an associated ship. Counsel for *Summit* sought to argue that the literal interpretation gave s11(8) 'no practical field of operation'. I have difficulty in accepting this ... Analysis shows that the so-called absurdity lies not in the application of s11(8) within its stated field of operation, but in the fact that the statute does not provide for the same system of queuing where a fund arises in other circumstances, such as where the ship is sold in pursuance of an action *in rem* to enforce a direct claim or an action *in personam*; or indeed whenever there are associated claims against a fund. It may well be that in this regard s11(8) is deficient but, as I have shown, it is not the function of the Court to remedy a *casus omissus*. If remedial action be needed, then that must be taken by the Legislature.'

<sup>12</sup> By way of the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992 which came into effect on the 1<sup>st</sup> July 1992. A minor remedial amendment was effected later that year by section 21 of the General Law Amendment Act, 139 of 1992 and there have been subsequent amendments not bearing upon the topic under discussion in 1997, 1998. An amendment in 2003 is referred to below.

provisions having a direct impact on the scope of the associated ship jurisdiction. Each of these amendments is dealt with below and placed in its context in relation to the associated ship provisions generally. The first is one that does not bear directly on the associated ship jurisdiction, but illustrates how far South Africa had travelled beyond the Arrest Convention on the road to reform.

## 2. EXPANSION OF THE LIST OF MARITIME CLAIMS

Jurisdiction can never be divorced from the claims that are capable of being pursued under that jurisdiction. Any expansion of the list of claims cognizable in admiralty has the result that the range of operation of the associated ship jurisdiction is extended. The revision of the Act brought with it a substantial expansion of the claims defined as maritime claims in section 1(1) of the Act. The original list of maritime claims<sup>13</sup> had overlapped substantially with the list of claims in article 1(1) of the Arrest Convention, although usually more broadly phrased.<sup>14</sup> The source of some of the departures from the Arrest Convention is often to be found in the claims giving rise to admiralty jurisdiction in various parts of the United Kingdom.<sup>15</sup> Some omissions were

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<sup>13</sup> Then in s 1(ii) of the Act.

<sup>14</sup> This was deliberate. See para. 7.1 of the Law Commission Report. See *m.v. Heavy Metal : Belfry Marine Limited v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA), para. 43, 1096H-1097B.

<sup>15</sup> In terms of s 20(2) of the Supreme Court Act, 1981 and in the case of Scotland in terms of s 47 of the Administration of Justice Act, 1956. See Shaw, *op cit*, 8.

remedied<sup>16</sup> and other areas were clarified.<sup>17</sup> It is unclear whether in any respect the jurisdiction under the Act is narrower than that provided for in terms of the Arrest Convention.<sup>18</sup>

A comparison of the list of maritime claims in the Act with the list of claims in article 1 of the Arrest Convention shows that from the outset it was intended that the jurisdiction conferred under the Act would be more extensive than that under the Arrest Convention. Perhaps the most significant extension was the inclusion of marine insurance, including claims by or against P & I Clubs.<sup>19</sup> With the 1992 amendments and the addition of six further claims the jurisdiction was further expanded. Thus it now includes claims arising out of or relating to agreements for the sale of a ship or a share in a ship or any other agreement with regard to the ownership, possession, delivery, employment or earnings of a ship;<sup>20</sup> disputes concerning containers and any agreement relating to any container;<sup>21</sup> salvage relating to any aircraft;<sup>22</sup> claims by ship's agents, clearing and

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<sup>16</sup> For example disputes about the possession of a vessel were included in section 1(1)(ii)(a) of the Act although they are not included in article 1(1)(o) of the Arrest Convention. See Berlingieri, *Arrest of Ships* (4<sup>th</sup> ed.) para. 52.261, 83. They were however historically part of the admiralty jurisdiction and part of the admiralty jurisdiction in England and Wales. Shaw, *op cit*, 10. Marine insurance was included on the basis that it is a maritime claim in the USA and Scotland. Shaw, *op cit*, 20.

<sup>17</sup> For example a claim relating to pollution was expressly included under section 1(1)(ii)(w) whereas it may be debatable whether this is included under article 1(1)(a) of the Arrest Convention. Berlingieri, *op cit*, para. 52.199, 57. Shaw, *op cit*, 23.

<sup>18</sup> The only possibility is that in terms of article 1(1)(f) of the Arrest Convention the claim is one for 'loss of or damage to goods *including baggage carried in any ship*'. Section 1(1)(ii)(g) of the Act in its original form refers to 'any claim for loss of or damage to goods (including the baggage and personal belongings of the Master or crew of a ship) carried or which ought to have been carried in a ship.' It is unclear whether that includes a claim by a passenger in respect of baggage. The amended section 1(1)(iv)(g) refers to a claim for 'loss of or damage to goods (including the baggage and *the* personal belongings of the Master, officers or seamen of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise.' The initial language of the section appeared to exclude passengers' baggage and the amended section was directed at including it. Whether it achieves that aim is debatable. The explanation that the inclusion of 'the' in the original section is a typographical error (Shaw, *op cit*, 13) is probably correct although it is not clear that its omission would have resolved the difficulty.

<sup>19</sup> In terms of section 1(1)(ii)(r) of claims relating to marine insurance or any policy of marine insurance and claims by or against P&I Clubs.

<sup>20</sup> Para (c) of the definition of 'maritime claim' in s 1(1).

<sup>21</sup> Para (i). The effect of this provision is to dispose of the difficulties that arose in *The 'River Rima'* [1988] 2 All ER 641 (HL); [1988] 2 Lloyd's Rep. 193 (HL).

forwarding agents, brokers, attorneys and other advisers relating to ships.<sup>23</sup> The scope of claims in respect of the remuneration of the Master and crew of a vessel was extended to include expressly all types of employment benefit funds and the contributions to those funds.<sup>24</sup> astly the amendments added claims arising out of piracy, sabotage or terrorism relating to property capable of being arrested in proceedings *in rem* or to persons on any ship<sup>25</sup> and added the general provision that a maritime claim included:-

‘Any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs.’<sup>26</sup>

This considerable extension of the list of maritime claims that may give rise to an arrest or an attachment *ad fundandam confirmandam jurisdictionem* of a vessel means that the Act departs even more significantly from the terms of the Arrest Convention than had originally been the case. The initial process of departure from the Convention evidenced by the Act in its original form has been substantially extended by the amendments to the list of maritime claims in the Act. In doing so the amendments anticipated in some respects the extension of the list of maritime claims embodied in the 1999 Arrest Convention.<sup>27</sup> In other respects particularly by making the list of claims open-ended, a matter on which agreement could not be reached at the Conference,<sup>28</sup> it adopted a clear stance on which there is no international consensus.

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<sup>22</sup> Para (k)

<sup>23</sup> Para (p)

<sup>24</sup> Para (s) This overcame the difficulties illustrated by the decision in *Continental Illinois National Bank and Trust Co. of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D).

<sup>25</sup> Para (bb).

<sup>26</sup> Para (ee).

<sup>27</sup> The International Convention on Arrest of Ships adopted at the Diplomatic Conference in Geneva on the 12<sup>th</sup> March 1999. The text of the 1999 Convention is set out in Berlingieri, *op cit*, 428-433.

<sup>28</sup> Berlingieri *op cit*, para. 99.10, 10 and 99.16-22, 55-6.

What are we to make of these substantial departures from the provisions of the Arrest Convention in the drafting of the Act and the significant extensions of those departures in the 1992 amendments? In particular, what is their significance insofar as the associated ship arrest provisions are concerned? The questions are not academic as is demonstrated by the reliance placed on the Arrest Convention in the judgments in the three most controversial cases dealing with associated ships namely the *Heavy Metal*<sup>29</sup> the *Fortune 22*<sup>30</sup> and the *Cape Courage*<sup>31</sup>. Those decisions will be considered in greater detail in due course. It is sufficient at this stage to submit that the significant extension of the list of maritime claims in the Act, embodying substantial departures in many areas from the Arrest Convention, demonstrates that reliance on the Arrest Convention in construing the Act is something that should be done only with caution and then only where there can be no realistic doubt that the provision in question is both linguistically and textually based on the Arrest Convention and where the context makes it clear that the legislature intended the Act to have effect in accordance with the common understanding of the Convention. It is one thing to have resort to the jurisprudence in other countries arising out of the application of the Arrest Convention where one of the maritime claims described in the Act in the same or similar terms to the description of one of the claims in the Arrest Convention is being interpreted. That is hardly controversial. What is controversial is when the Convention is taken as a starting point for the consideration and understanding of provisions that are either wholly novel or at the least involve a substantial departure from the terms of the Convention and the underlying principles that it embodies, merely because of perceived similarities of language but absent a similarity of context.

In the light of the obvious intention to make the ambit of the admiralty jurisdiction conferred upon courts in South Africa substantially wider than that conferred under the Arrest Convention or legislation directed at implementing that Convention, it is submitted that it is a

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<sup>29</sup> *m.v. Heavy Metal : Palm Base Maritime SDN BHD v Dahlia Maritime Limited and others* 1998 (4) SA 479 (C) and *m.v. Heavy Metal : Belfrey Marine Limited v Palm Base Maritime SDN BHD* 1999 (3) SA 1065 (SCA).

<sup>30</sup> *m.v. Fortune 22: Owners of the m.v. Fortune 22 v Keppel Corporation Limited* 1999 (1) SA 162 (C).

<sup>31</sup> *mv Cape Courage: Bulkship Union SA v Qannas Shipping Co Ltd and another* 2010 (1) SA 53 (SCA).

dangerous exercise for courts to see parallels between the provisions of the Act governing the novel institution of the associated ship and provisions of the Arrest Convention. As has already been pointed out<sup>32</sup> the notion that the associated ship is merely an extension of the sister ship provisions of the Arrest Convention does not bear close scrutiny. There is accordingly no foundation for the suggestion that in construing the nature and ambit of the associated ship provisions of the Act guidance can safely be sought from jurisprudence arising from the implementation of the Arrest Convention. A more subtle danger arises where a provision in the Act has its linguistic origin in the Convention<sup>33</sup> but the overall statutory context under the Act differs from that in the Convention. An endeavour to give the South African provision not only the same meaning but the same effect as the Convention avoids the necessary task of construing the Act in order to ascertain its meaning in South Africa. Had it been the intention simply to implement the Arrest Convention in South Africa there were simpler ways of doing so and the associated ship jurisdiction would not have come into existence. A construction of the provisions dealing with associated ships that seeks to maintain harmony between the provisions of the Convention governing arrests generally and sister ship arrests in particular and those of the Act governing associated ship arrests starts from a failure to recognise the profound differences between the two and serves to confine the latter jurisdiction in a straitjacket not of the legislature's making.

Whilst the range of claims that are recognised as maritime claims in terms of the Act and hence are potentially enforceable by way of an action *in rem* against an associated ship does not directly impact upon the associated ship provisions themselves, it is submitted that it nonetheless provides an indication of the approach that should be taken to the relevance of the Arrest Convention in relation to those provisions. What is unquestionable is that from its inception the Act went well beyond the Arrest Convention in establishing and defining the scope of the

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<sup>32</sup> In Chapter 4, *ante*.

<sup>33</sup> Such as section 3(8) which provides that property may not be arrested and security therefor given more than once in respect of the same maritime claim by the same claimant. This corresponds with the opening words of Article

associated ship jurisdiction. It also went further than the provisions of the English Administration of Justice Act 1956<sup>34</sup> and the Supreme Court Act 1981<sup>35</sup>. This is a clear indication that the Act is not to be seen as an attempt to introduce by statute the provisions of an international convention, without acceding thereto.<sup>36</sup> The compromise of the Arrest Convention, represented by its sister ship arrest provisions, which permitted the arrest of either the particular ship or a sister ship, is wholly circumvented in South Africa in all cases (save those where reliance is placed upon a maritime lien not arising from the personal liability of the owner of the particular ship), because of the ability to attach any sister ship *ad fundandam et confirmandam jurisdictionem* in an action *in personam* against the owner.<sup>37</sup> It is beyond question that the true associated ship is an innovation that departs fundamentally from conventional principles of company law and has no direct points of contact with anything in the Arrest Convention. In those circumstances it is submitted that an attempt to analyse the true associated ship provisions conformably with the Arrest Convention is a process for which there is no warrant.

### 3. AMENDMENTS TO THE ASSOCIATED SHIP PROVISIONS

There were significant amendments to both provisions of the Act dealing with associated ships. The first was the amendment of section 3(6) of the Act which provides for the institution of an action *in rem* brought by the arrest of an associated ship. In its original form the section had excluded three types of maritime claim from those that could be pursued by way of an action *in*

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3(3) of the Arrest Convention. This will be dealt with in the examination of the decision in *MV Fortune 22, Owners of the MV Fortune 22 v Keppel Corporation Ltd* 1999 (1) SA 162 (C) in Chapter 8.

<sup>34</sup> 4 & 5 Eliz. 2 c46

<sup>35</sup> 1981 c54

<sup>36</sup> As had been the case with the Hague Rules, which were given statutory effect in terms of sections 307 to 310 of the Merchant Shipping Act, 57 of 1951 and occurred with the Hague-Visby rules in terms of the schedule to the Carriage of Goods by Sea Act 1 of 1986.

<sup>37</sup> Shaw, *op cit*, 37. This is so irrespective of whether there is some restriction in regard to proceeding *in rem* against both the particular ship and a sister ship.

*rem* against an associated ship. Those were the claims in section 1(1)(ii)(a), (b) and (c) of the Act which were:-

- ‘(a) any claim relating to the ownership or possession of a ship;
- (b) any claim relating to the ownership of a share in a ship or to any dispute between co-owners of a ship as to the ownership, possession, employment or earnings of that ship;
- (c) any claim in respect of a mortgage, hypothecation, right of retention or pledge of or charge on, a ship.’

Some of these restrictions were now removed so as to extend the possible range of maritime claims in respect of which such an action could be brought. Others were preserved and in one, probably academic, respect extended. The restriction was preserved only in respect of the claim set out in paragraph (d) of the definition relating to:-

‘Any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship and any bottomry or *respondentia* bond.’

Bottomry and *respondentia* bonds are virtually unknown in modern shipping practice but they had not previously been excluded from the ambit of the associated ship arrest. This was probably an oversight and the amendment resolved that oversight. To that extent this extension of the restriction is probably only of academic relevance. The excluded claims are those that afford the claimant not only a claim sounding in money but also a right of security over the vessel in respect of which the claim arose. To that extent it can be said that it is logical to require that these claims should not be capable of being pursued save against the vessel in respect of which the claims lie and which constitutes the security for the claim. The notion of transferring the security that a claimant enjoys over vessel A to an associated ship, vessel B, is one so fraught with obvious practical problems, such as how such security would rank in relation to existing security over vessel B, that the legislature rightly drew back from allowing associated ship proceedings in these cases.

What is of greater importance is the extension of the possible scope of the associated ship arrest to include certain claims originally excluded, although it is unclear how some claims



falling under these heads can be pursued in a satisfactory fashion by way of an associated ship arrest and consequent action *in rem*. For example it is now possible to pursue a claim relating to ownership or possession of a ship by way of an associated ship arrest. However it is difficult to see how a South African court can determine a claim for possession of a vessel that is not within its jurisdiction and under its control by way of a claim against an entirely different vessel. More sensibly therefore this extension must be taken to have effect in relation only to monetary claims arising from questions of ownership or possession of a ship, such as a claim for damages arising from late delivery of a vessel under an agreement of sale. In principle there is no reason why such claims should not be pursued in this way. With claims between co-owners it is doubtful whether the change is of any moment. If the claim relates to the terms of the registration of the vessel in the South African register there will be no need for an arrest as the register is located in South Africa. If one is looking at the position in relation to a foreign register a South African court could not exercise jurisdiction effectively. It will therefore only be claims of a monetary character against the owner of the majority interest in the vessel that can be pursued meaningfully by way of an action commenced by the arrest of an associated ship. However in order to make use of this remedy it will be necessary to show that the claim is one that lies against the owner of the ship and in a situation of co-ownership that seems to be impossible. The change may therefore be one more of form than substance.

The second and more significant amendment related to the language of section 3(7), which was so substantially amended that it is in effect a new section. It reads as follows:-

‘(7)(a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose:-

- (i) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
- (ii) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or
- (iii) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

(b) For the purposes of paragraph (a):-

- (i) ships shall be deemed to be owned by the same persons if the majority in number of, or voting rights in respect of, or the greater part, in value of, the shares in the ships are owned by the same person;
- (ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;
- (iii) a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares;
- (c) If at any time a ship was the subject of a charterparty the charterer or sub-charterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the sub-charterer, and not the owner is alleged to be liable.’

A comparison between this provision and its predecessor demonstrates that they are significantly different. Whilst the original notion may simply have been to fill some potential gaps and clarify one or two problematic areas, the amendments not only address these issues but clearly and deliberately extend the area of operation of the associated ship arrest provisions. At the same time there was a substantial extension of the scope of the security arrest provisions in section 5(3) of the Act. All this is indicative of the fact that both the associated ship and the security arrest were provisions that had been welcomed within the international maritime community, at least by claimants and their underwriters. Whilst no doubt those affected by their application viewed them with a jaundiced eye there was nothing to indicate that the implementation of this broad and generous jurisdiction had an adverse affect on the willingness of vessels to call at South African ports. Nor had the application of the jurisdiction given rise to any problems that would call for its reconsideration. In those circumstances the opportunity was taken to extend the scope of the associated ship provisions. The different ways in which greater clarity and a more extensive jurisdiction were achieved are examined below.<sup>38</sup>

(a) **Control of the ship-owning company**

As noted earlier<sup>39</sup> the control which was originally relevant to establishing whether a ship was an associated ship was ownership or control of the shares in the company owning the

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<sup>38</sup> There is a helpful article on the amendments by H Staniland, *Ex Africa Semper Aliquid Novi: Associated Ship Arrest in South Africa*, 1995 LCMLQ 561.

<sup>39</sup> Chapter 5, *ante*.

putative associated ship. Several judgments had pointed out that control of the shares of a company is a different matter from control of the company itself. In addition what was required was control of all the shares in the company. Whilst this protected minority shareholders it also provided a simple means for avoiding the provision entirely by vesting a single share in someone other than the person in control of the company.

The amendment directly addressed all of these problems. In cases where the ship concerned or the associated ship are owned by a company or both of them are owned by companies - which is the normal situation - it makes control of the relevant company the touchstone for liability. In other words ownership or control of the shares in the company becomes merely an indication of where actual control of the company lies. However, it is no longer decisive. That is a helpful amendment as far as applicants are concerned because in many cases it is not feasible to discover the identity of the person who owns or controls the shares in a ship-owning company. The principal reasons for this are that in many jurisdictions there is no access to the share register of the company or the shares are bearer instruments or are held by nominees. However, actual control can often be discerned from outward matters ascertainable from an examination of the trading operations of the company in question. However, this must not be taken too far. The amendment rendered applicable the statement made in one of the earlier cases<sup>40</sup> that the control contemplated in section 3(7):-

‘...relates to overall control, such as is exercisable for instance by a majority shareholder or his nominee, of the assets and destiny of the company; it does not refer to its day to day management and administration.’

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<sup>40</sup> *EE Sharp & Sons Limited v m.v. Nefeli* 1984 (3) SA 325 (C) 327H-328A. Hofmeyr, *op cit*, 70 is critical of this decision on the grounds that the factual basis upon which it was held that there was an association was inconsistent with this passage. The facts showed that the same individual was the president and director of the two companies and could by his signature bind the companies. There was no suggestion that the person concerned held these offices as a nominee or other than by virtue of his interest in the companies. On the face of things it was a far clearer case of association than the ground accepted in both the court below and by the majority in the SCA in the *Heavy Metal*, which was that a person who expressly stated that he was a nominee and nothing more than a post box in relation to the two companies controlled both of them. Hofmeyr (at 71-72) seems to be critical of the latter reasoning as well.

In one other respect the amendment brought about a significant change in the legal position. The previous section had referred to ‘the shares in the company’ and this was construed as meaning ‘all the shares in the company’.<sup>41</sup> The court had gone on to say that:-

‘That interpretation accords with the policy of the Act regarding associated ships. An associated ship may be arrested instead of the ship in respect of which the maritime claim arose and it then becomes liable to be sold in terms of s9 of the Act. *The Legislature could never have intended that a person owning shares in the company which owns the alleged associated ship, but who is a stranger to the company which owns the ship in respect of which the maritime claim arose, should be deprived of his interest by its arrest as an associated ship.*’ (Emphasis added)

The amendments not only render this view academic but contradict the court’s perception of the intention of the legislature insofar as the policy underlying the section is concerned. As the section is now concerned solely with control of the company it disregards the position of persons holding minority interests in the company, whether one is dealing with the ship concerned or an associated ship. Accordingly if A controls two ship-owning companies at the times relevant for a consideration of the question of association it will not matter that a minority shareholder in the company owning the associated ship has no interest in the company owning the ship concerned. Such a person can now clearly be deprived of his or her interest in the associated ship under the new provision notwithstanding that they have no connection with or responsibility for the default by the ship concerned.

The effect of this change is to simplify the task of the arresting creditor and to extend the scope of the jurisdiction. Hitherto the arresting creditor had to show that the companies owning the two vessels had the same shareholders although they could hold their shares in different proportions. Thus in the case of two companies A and B, if one postulated that the shareholding in A was held by X as to 60% and Y as to 40% and the reverse prevailed in relation to B, the one company would be controlled by X and the other by Y, although the vessels would be held to be associated. The amended section avoids this possibility, which is probably fairly unusual in

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<sup>41</sup> *Dole Fresh Fruit International Limited v m.v. Kapetan Leonidas* 1995 (3) SA 112 (A) 119G-I.

practice<sup>42</sup>, by concentrating on the person in whom the power of control vests and providing that if the same person controls both companies the association is established notwithstanding the presence of minority shareholders in either company. The effect of rendering the presence of minority shareholders irrelevant is probably to extend the scope for associated ship arrests especially as in the example given above it would frequently be possible to contend that X and Y jointly controlled both companies. However it does raise the possibility of a constitutional challenge to the associated ship jurisdiction on the basis that it involves an arbitrary deprivation of the property of the minority shareholder. That is a topic that will need to be addressed when dealing with the relationship between the associated ship arrest provisions and the rights that now enjoy constitutional protection in South Africa in terms of the Bill of Rights embodied in the Constitution.<sup>43</sup>

Apart from the possible impact that the amendment could have upon parties holding a minority interest in ship-owning companies the amendment had the potential to create an association that would not have existed prior to its coming into force. That provided a substantial reason for it to be held that the amendments were not retrospective in effect. In *The Pericles GC*<sup>44</sup> Corbett CJ said that:-

‘... it seems to me that if the amending Act of 1992 were to be applied to the maritime claims which appellant seeks to enforce it would operate in a manner which prejudiced shipowners by creating burdens or obligations that did not exist before.’

He went on to illustrate how this could occur as a result of the test for association being changed to a consideration of the control of the company instead of the ownership or control of the shares in the company, by way of the following example.

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<sup>42</sup> I have come across one situation where a European shipping line and a line operating in South East Asia undertook a number of joint services the vessels for which were owned by companies in which they each owned shares but always depending on the location of the joint operation, so that in the European operations the European line owned the majority stake in the ship-owning companies and in the case of the Asian operations the position was reversed.

<sup>43</sup> Chapter 2 of the Constitution of the Republic of South Africa Act.

'X (the person concerned) owns all the shares in company A which in turn owns ship No. 1. Ship No. 2 is owned by company B, in which X has a minor (as to number of shares), but controlling, shareholding. Prior to the coming into effect of the amending Act in 1992 (but after the coming into effect of the Act on 1 November 1983) an event occurs giving rise to a maritime claim in respect of ship No. 1, thus causing it to become the guilty ship. After the amending Act has come into effect the claimant applies to arrest ship No. 2 as an associated ship. If the Act and the original definition apply, ship No. 2 *cannot* be arrested because at the time when the claim arose X did not own or control the shares in B company. If, on the other hand, the amending Act and the new definition were to apply, ship No. 2 could be arrested because at the time the action commenced X controlled B company.'

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The example was given to illustrate how a new burden could be placed upon a shipowner and how vested rights could be adversely affected if the amendments were to be given retrospective effect. The conclusion that the amendments did not operate retrospectively was accordingly inevitable.<sup>46</sup>

(b) **Majority ownership of the shares in a ship**

The original section 3(7)(b)(i) of the Act followed the wording of article 3.2 of the Arrest Convention in deeming ships to be owned by the same persons if all the shares in the ship were owned by the same persons. This referred to the practice of dividing the ownership of a vessel into shares<sup>47</sup> and had the effect that the two would be regarded as associated ships, provided the

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<sup>44</sup> *National Iranian Tanker Co v The Pericles GC* 1995 (1) SA 475 (A), 484G-H.

<sup>45</sup> At 484I-485B.

<sup>46</sup> It appears from the facts set out in the judgment in the *Pericles GC* that the application was squarely based upon the amended provisions of the Act. A reading of the facts suggests that it was possible that the *Pericles GC* was an associated ship under the original provisions in respect of the two ships concerned, but that the applicant had insufficient information available to it to demonstrate that fact.

<sup>47</sup> The origin of the practice may lie in Italian maritime states as a way of sharing the costs of building and equipping ships. According to Transport Canada's website [www.tc.gc.ca/Marine\\_Safety/Ships-and-operations-standards/FAQ.htm#20](http://www.tc.gc.ca/Marine_Safety/Ships-and-operations-standards/FAQ.htm#20) its origin is obscure. The use of 64 shares may be explained by a convenient adoption of the binary system or by the fact that most vessels had 64 ribs or as a result of an Elizabethan tax. Whatever the origins of the practice it is usual to register ships in many jurisdictions having an English heritage in 64 shares. See for example section 15(1)(a) of the Ship Registration Act 58 of 1998. In Italy it is 24 shares and in some countries 100 shares. Coles R, *Ship Registration: Law and Practice*, 4<sup>th</sup> Ed. (2002), para 1.26, p 7.

same individuals or entities were owners of the shares in both ships. As in the case of control of the two ship-owning companies it did not matter if X held the majority of the shares in ship A and Y the majority in ship B, provided that all the shares in the two ships were owned by X and Y.

The amendment to section 3(7)(b)(i) changed this by altering the basis for determining whether vessels are associated. Ships are now deemed to be owned by the same persons (the use of the plural appears to be deliberate) if those persons own the majority in number of the shares in the ships. That resolves the question that could arise under the original section where ownership of all the shares in the vessel had to lie, albeit not necessarily in the same proportions, with the same persons. In the example given above if a third shareholder Z is interposed in either company, provided X and Y continue to own the majority of the shares in both vessels they will be deemed to be the owners of both for the purpose of association. Once again that is an amendment that favours claimants and makes an associated ship arrest easier, although the instances where the section may have to be invoked are likely to be few and far between.<sup>48</sup> If the section is to be invoked it is submitted that what is required is that a person or persons own the majority of the shares in the ship, in other words if the shares in the ship are divided into 64 shares as is customary they must own 33 or more. The section does not speak of the majority owner of shares but of owning the majority in number of the shares. One does not do that if one owns 32 or fewer shares in the ship.<sup>49</sup>

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<sup>48</sup> The writer has not encountered a situation where this section came into play and there is no reported case where it was applied.

<sup>49</sup> The issue arises because of the rather odd example given by Marais JA in *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) 1110, para 6 where he said: 'For example, if x was the sole owner of ship A (the guilty ship) and there is another ship, B, in which there are 64 shares of which x owns 30, y 20, and z 10, ship B in its entirety is deemed to be owned by x even although it is not in fact so owned. It seems clear that dominance of ownership in a situation of divided ownership, or dominance of control in such a situation, or dominance in the relative values of respective shareholdings, is considered to be the justification for equating the situations.' It appears that there is a typographical error and that he intended to refer to x owning 34 shares not 30 shares. If he meant that ownership of 30 shares suffices to bring the section into play in a situation where there are 64 shares or even only 60 shares, he was, with respect, incorrect.

However the section now goes on to speak of the majority voting rights in respect of the shares in the ships or the greater part in value of the shares in the ships. This seems to be anomalous as it is the ownership interest in the ship that is expressed as being divided into shares and this interest that is being dealt with in the section. It is difficult to conceive of a situation where those interests are expressed in terms of voting rights or with different values and it is hard to avoid the impression that elements of rights attaching to shares in a company have been permitted to creep into a section dealing with an entirely different type of share. If, by way of example, the provisions of section 15 of the South African Ship Registration Act, 58 of 1988 or section 23 of the Canada Shipping Act, 1985<sup>50</sup> are examined they cannot be reconciled with the idea that the shares in a ship applicable in relation to registration could be shares giving different voting rights or shares having different values. That latter notion appears more compatible with a corporate structure in which shares of different classes enjoy different voting rights.

(c) **When must the association exist?**

The potential difficulties relating to the relevant times when ownership or control of the ship concerned and the associated ship had to exist were resolved by the amendments. In relation to the ship concerned the amendments now stated expressly what had in any event been the accepted construction, namely that the relevant date is the date upon which the claim arose.<sup>51</sup> In regard to the associated ship the relevant date at which to determine either ownership of the ship or control of the company owning the ship is clearly stated to be the date of the commencement of the action. It is submitted, for reasons that will be discussed later in analysing the present requirements of the action *in rem* against the associated ship, that this will be the date of the

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<sup>50</sup> R.S., 1985, c. S-9. Section 53 of the Canada Shipping Act, 2001 [2001, c. 26] is to the same effect.

<sup>51</sup> As to when a claim arises see *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and others (Fund constituting the proceeds of the sale of the mv Forum Victory)* 2001 (3) SA 529 (SCA) and *mv Cape Courage: Bulkship Union SA v Qannas Shipping Co Ltd and another* 2010 (1) SA 53 (SCA) and the further discussion below.



vessel's actual or deemed arrest<sup>52</sup>. This latter amendment gives effect to the purpose of the section, which is to make available to creditors property owned or under the control of the party that owned or controlled the owner of the ship concerned.

The manner in which the section is structured with its emphatic statements that it is ownership or control of the company owning the ship concerned at the time the claim arose and ownership or control of the company owning associated ship at the time of the commencement of the action that gives rise to an association serves to identify the key dates and finally laid to rest another issue that arose from the terms of section 3(6). That section provides that an action *in rem* may be instituted by the arrest of an associated ship 'instead of' the ship concerned. The use of this expression, when read in the light of the provisions of section 3(4), founded an argument that at the time that it is sought to arrest the associated ship there must be at least a notional possibility that the ship concerned could, if it came into a South African port, itself be subject to arrest in respect of the claim. This argument had been upheld in the court below in the *Fayrouz IV* but was rejected on appeal<sup>53</sup>. In the High Court in the *Heavy Metal* that decision was followed<sup>54</sup> and it was endorsed on appeal<sup>55</sup>. Farlam AJA laid stress on the fact that each subsection is couched in the present tense when it speaks of ownership or control of the owner of the associated ship but in the past tense when it deals with the same matters in relation to the ship concerned. That was rightly held to be a decisive indication by the legislature that it is

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<sup>52</sup> Section 1(2)(iii) of the Act provides that an action shall for any relevant purpose commence by the service of any process by which that action is instituted; by the issue of any process for the institution of an action *in rem* and by the giving of security or an undertaking as contemplated in s3(10)(a). It is submitted that there cannot be different dates of commencement for the same purpose and therefore that a choice must be made as to the correct date for any particular purpose. As in terms of s 3(5) an action *in rem* is instituted by the arrest within the area of jurisdiction of the court concerned of property against or in respect of which the claim lies it is submitted that the date of service of the process instituting the action, which in an action *in rem* coincides with the date of arrest, either because the court has authorised the arrest or because the warrant of arrest cannot be issued unless a summons has also been issued (Admiralty Rule 4(3)), will be the relevant date for the purpose of association.

<sup>53</sup> See *October International Navigation Inc v mv Fayrouz IV* 1988 (4) SA 675 (N) 678E.

<sup>54</sup> *MV Heavy Metal: Palm Base Maritime SDN BHD v Dahlia Maritime Ltd and others* 1998 (4) SA 479 (C) 484G-487I.

unnecessary for it still to be possible to pursue an action *in rem* against the ship concerned in order to bring such an action against an associated ship<sup>56</sup>.

In the result it matters not that the ship concerned no longer exists or that it has changed hands since the claim arose. This is a construction that is most favourable to claimants as it means that they can still pursue their claims even if the ship is lost or has been scrapped or sold. In those circumstances they are no longer left with a meaningless claim against a company that no longer has any asset or may even no longer exist. Previously even if their claim gave rise to a maritime lien that was of little use if the vessel had been sunk or scrapped. The advantages conferred on claimants by the associated ship jurisdiction are starkly manifested in such situations.

(d) **What is a company?**

In considering the potential difficulties presented by the associated ship provisions as originally enacted one of the issues identified was the possibility that ships could be owned by companies that did not have a share capital. Also there was the possibility that it could be owned by some other form of corporate entity such as the close corporation or a corporation established by charter. Whilst in South Africa a trust is not a corporate body<sup>57</sup> it is possible that under different legal regimes it would be regarded as such<sup>58</sup>. In order to make the associated ship provisions applicable to all forms of corporate ownership of ships section 3(7)(b)(iii) introduced

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<sup>55</sup> *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA), paras 48-51.

<sup>56</sup> See *MV Ivory Tirupati: MV Ivory Tirupati and another v Badan Urusan Logistik (aka BULOG)* 2003 (3) SA 104 (SCA), para 40 and the discussion in Hofmeyr, *op cit*, 68-69.

<sup>57</sup> *Commissioner for Inland Revenue v Friedman and Others NNO* 1993 (1) SA 353 (A) 370.

<sup>58</sup> One must also bear in mind other similar but by no means identical legal institutions such as the German *stiftung* or the foundation that is a prominent feature of certain Scandinavian legal systems.

a provision that a company includes ‘any other juristic person and any body of persons’ irrespective of whether any interest therein consists of shares.

This provision gives a more extensive meaning to the word company than it would otherwise bear<sup>59</sup> if viewed exclusively through the prism of South African company law. It does however ensure that whatever form of corporate ownership may be adopted in relation to a ship it will still be possible to apply the associated ship provisions in relation thereto. In the result the associated ship jurisdiction will not be limited by parochial considerations of what constitutes a company but is sufficiently flexible to accommodate any form of corporate ownership. This is wholly consistent with its intended purpose.

(e) **Deemed ownership of the chartered vessel**

In its original form section 3(7)(c) had provided that the charterer or sub-charterer by demise was deemed to be the owner of the ship concerned in respect of claims that lay against the charterer rather than the owner of the vessel. This enabled parties having such claims to find other vessels owned by the charterer or owned by companies controlled by the charterer and arrest those vessels as associated ships in respect of their claims. It did not entitle them to arrest the ship concerned. The section was undoubtedly modelled on the Arrest Convention<sup>60</sup> although, unlike the Convention, it did not permit the arrest of the ship subject to the demise charter but only the associated ship. Shaw suggested<sup>61</sup> that there was an argument that the reference to the owner in section 3(4) of the Act, which permits the vessel in respect of which the maritime claim arose to be arrested if ‘the owner’ of the ship would be liable in an action *in personam* to the

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<sup>59</sup> Contrary to the view expressed by Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa*, 69 this does not make it a deeming provision unlike the provisions of sections 3(7)(b)(i) and (iii). Not every definition is a deeming provision. However that may be immaterial as it is clearly conclusive of what constitutes a company for the purposes of these provisions

<sup>60</sup> Article 3.4. Shaw, *op cit*, 40-41.

<sup>61</sup> Shaw, *op cit*, 32-33.

claimant in respect of that claim, is capable of including the demise charterer. The basis for the argument is that in common parlance the demise charterer is frequently referred to as being *pro hac vice* the owner of the vessel. However, as he recognised, the language of section 3(7) that clearly drew a distinction between the owner and the demise charterer of the vessel militated against that construction and it is doubtful whether such an argument would have succeeded. The question was resolved when section 1(3) was introduced into the Act<sup>62</sup> with effect from the 20<sup>th</sup> June 2003. This provided that for the purposes of an action *in rem* a charterer by demise is deemed to be, or to have been, the owner of the ship for the period of the charter. It follows that it is unnecessary to consider the arguments for and against the proposition that a demise charterer is encompassed in the concept of an owner for the purposes of section 3(4) of the Act. It is safe to proceed on the basis that in its original form when the Act referred to the owner of the vessel it did not include the demise charterer. The amendment to introduce section 1(3) with its deeming provision appears to recognise that this was the case and deliberately sets out to remedy it.<sup>63</sup>

Section 3(7)(c) itself was amended in 1992 to remove the original limitation to demise charterers and extend the scope of the deeming provision to include all charterers. This is a considerable extension as time and voyage charters are far more numerous than charters by demise. The extension should be of assistance in two circumstances. The first is where the charterer is the carrier of the cargo on board the vessel and the cargo is lost or damaged. The second is in relation to supplies to the vessel such as bunkers and stores for which the charterer may bear financial responsibility under the charterparty. The unpaid creditor in each instance is now able to seek out a vessel owned or controlled by the charterer or the person who controlled the charterer in order to arrest it and enforce the claim. The underlying principle remains the same namely that the party that stands behind the debtor should be the party behind the company that owns the associated ship. The fact that the extension applies to all charterers is an indication

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<sup>62</sup> By way of section 10 of the Sea Documents Act, 65 of 2000.

<sup>63</sup> *Patel v Minister of the Interior and Another* 1955 (2) SA 485 (A) 493A-D cited with approval in *National Education Health and Allied Workers Union v University of Cape Town and others* 2003 (3) SA 1 (CC), para 66.

of how useful the associated ship jurisdiction has become to claimants seeking to enforce maritime claims.

The problem of retrospectivity that had arisen in relation to other aspects of the associated ship jurisdiction also arose in consequence of the amendment to section 3(7)(c). The case arose from the arrest of the *MV Yu Long Shan*<sup>64</sup>. An arbitration award had been obtained by the claimant against the charterer of a vessel sub-chartered to the claimant. The dispute that gave rise to the award had arisen prior to the amendment of section 3(7)(c) as had the reference to arbitration. However the arbitrator only handed down his award after the amendment came into effect. Arguing that the claim under the arbitration award was a separate and distinct maritime claim the claimant arrested the *MV Yu Long Shan* as an associated ship in reliance on the amended section on the basis that the ship in respect of which the dispute had originally arisen was time chartered to a party controlled by the same entity as controlled the owner of the *MV Yu Long Shan* at the time of the arrest. As with the decisions in the *Berg* and the *Pericles GC* the Court concluded that it had not been the intention of the legislature to make the extension of liability operate so as to make an associated ship arrest available to a claimant even though it had not been available to that claimant in respect of that claim before the amendments came into effect. This decision reinforces the fundamental position that our courts have taken that the arrest of an associated ship involves a substantively different claim and gives rise to an entirely distinct action *in rem* from the claim against the ship concerned.

One matter relating to this section and not dealt with directly in the amendments in 1992 justifies comment. In its original form section 3(7)(c) drew a clear distinction between the demise charterer and the owner of the vessel in specifying that it is where the charterer or sub-charterer by demise ‘and not the owner’ is liable in respect of a maritime claim that the deeming provision came into operation. That has the effect<sup>65</sup> that in circumstances where there might be joint

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<sup>64</sup> *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA). The judgment in the court below is reported as *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1997 (3) SA 629 (D).

<sup>65</sup> As Shaw, *op cit*, 41, pointed out.

liability, which could possibly be the case both in relation to cargo claims and in relation to delictual claims, the deeming provision would not come into play. This did not prove controversial, as it is a situation very unlikely to arise. The distinction is preserved in the present section. However there is a far greater likelihood of the owner and the charterer being jointly liable in respect of a maritime claim where the charter is a time or voyage charter than where the charter is one by demise. The effect is that a claimant having a claim against both the owner and the charterer is free to arrest the ship concerned or an associated ship but may not arrest *in rem* a vessel owned by the charterer or owned by a company controlled by the charterer or the same person as controls the charterer. It is unclear why this should be so when such an arrest would be permissible if the claim lay against the charterer alone. There is after all no prospect of two vessels in the same ownership or under the control of the same person being arrested. It is true that two vessels may be arrested but the one will be arrested in respect of the owner's liability and the other in respect of the charterer's liability. That seems fair and in accordance with the general purpose of the associated ship provisions as well as the purpose underlying this deeming provision.

There are clearly provisions such as section 3(8) where the drafting of the Act was influenced by the express provision of the Arrest Convention that precludes the arrest of more than one vessel. If section 3(7)(c) was influenced by that - and this would be no more than speculation - it is submitted that such a restriction defeats the very purpose for which the associated ship jurisdiction was established. The aim of these provisions is to enable claimants to pursue claims by arresting associated ships instead of the ship in respect of which the claim arose. It is suggested that there is no need for the South African legislation to adhere to a restriction in the Arrest Convention - namely the restriction that only one vessel can be arrested and not all the property of the debtor as in many Continental systems - that reflects the historic compromise that is inherent in the terms of that Convention but has nothing to do with the novel jurisdiction introduced in this country by way of the associated ship jurisdiction. South Africa has moved beyond the compromises of the Arrest Convention. It accordingly seems to be unnecessary and anachronistic to maintain a limitation on what is sought to be achieved by the associated ship jurisdiction that prevents potential claimants from using these provisions merely

because there are two parties liable in respect of a particular claim. I suggest that the limitation in the section should be reconsidered and removed. This could be achieved quite simply by deleting the words ‘and not the owner’ in section 3(7)(c).

#### 4 **THE PRESENT REQUIREMENTS FOR AN ASSOCIATED SHIP ARREST**

Against the background of the amendments we can now turn to examine the different elements of an associated ship arrest and look at each of the elements that must be established by a claimant wishing to pursue an action *in rem* by the arrest of an associated ship or to obtain the arrest of an associated ship for the purpose of obtaining security in terms of s 5(3) of the Act. Each step that must be followed by the arresting creditor will be considered in turn. It is suggested that for a successful arrest five questions will need to be asked and answered<sup>66</sup>. They are the following.

##### (a) **Has the claimant a maritime claim arising in respect of a particular ship?**

The requirements for an associated ship arrest fall into two categories and must be viewed at two different times. The first category encompasses the claim and the ship in respect of which the claim arises and the second the associated ship itself. The initial requirement for an associated ship arrest is that the claimant has a maritime claim that arose in respect of a particular ship (‘the ship concerned’). All maritime claims can potentially give rise to an associated ship arrest, with the exception of claims falling under section 1(1)(iv)(d) of the Act. These are the claims already mentioned namely claims for, arising out of or relating to any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship and any bottomry or respondentia bond.

Although the Act does not expressly contain such a limitation there is an inherent limitation on the claims that are capable of giving rise to an associated ship arrest. This flows from the requirement in section 3(6) of the Act that the associated ship is arrested instead of the ship ‘in

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<sup>66</sup> The questions set out in (e) and (f) *infra* are alternative questions, depending on whether one is looking at ownership of the two vessels or control of the companies owning the two vessels.

respect of which the maritime claim arose'. It follows from this that an associated ship arrest is only available in respect of maritime claims that initially arose in respect of a particular ship. Thus a maritime claim of a purely general nature that has no connection to a particular ship cannot give rise to an associated ship arrest<sup>67</sup>. An example of such a general claim would be a claim for outstanding hire in respect of containers made available generally to a shipping line for use on its fleet of vessels in terms of a container leasing agreement or a supply of fuel to a shipping line's tanks for general use in all its vessels. Whilst such a claim is a maritime claim in terms of section 1(1)(iv)(i) of the Act it is not a claim that arises in relation to a specific vessel. As such it cannot give rise to an associated ship arrest.

There are a number of claims defined as maritime claims that can potentially give rise to issues of this type. For example any claim for services rendered to a fleet as opposed to a particular vessel, such as vessel tracking services or weather reporting services, will not ordinarily be claims in respect of a particular ship. Agency services will need to be scrutinised carefully to see whether they were truly rendered in respect of a particular vessel or whether the appointment of the agent is perfectly general on behalf of a line or fleet of vessels. The services of attorneys or advisers, whilst often in respect of particular vessels, are frequently rendered at the instance of insurers and P & I Clubs rather than the owners of the vessels themselves. A salvage claim in respect of an aircraft (section 1(1)(iv)(k) of the Act) cannot be a claim in respect of a particular ship and some claims in respect of P&I contributions and marine insurance policies will not be in respect of particular vessels. Such claims cannot found a conventional action *in rem* because such an action must be commenced in terms of section 3(5) by the arrest of property of one or more specified categories 'against or in respect of which the claim lies'. A general claim of the type under discussion cannot satisfy this requirement. Likewise they cannot found an action *in rem* against an associated ship.

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<sup>67</sup> The reasoning is similar to that of the House of Lords in *The River Rima* [1988] 2 All ER 641 (HL) at 645 a-e also reported as *Tiphook Container Rental Co v The River Rima* [1988] 2 Lloyd's Rep 193 (HL) as applied in *The Lloyd Pacifico* [1995] 1 Lloyd's Rep 54 (QB (ComCt)). See also *I.C.S. Petroleum (Montreal) Ltd. v. Polina 3 (The)* (F.C.), 2005 FC 251, [2005] 3 FCR 595 and *Specialty Shipping Units Pte Ltd v The Owners of the Ship or Vessel*



It follows from this initial requirement that, save in the case where the claim is one for which the charterer or sub-charterer and not the owner of the ship concerned is liable, the claim must at the time that it arises be one that would, at least notionally in the sense of satisfying the requirements for such an arrest under the Act, be capable of being pursued against the ship in respect of which the claim arose. That this only needs to be notional is clear because it is immaterial whether that notional possibility is capable of practical realisation. Thus in many cases the possibility of arresting the ship concerned may never arise although it would be feasible if the ship concerned came within South African waters. Notionally the ship concerned might be susceptible to an arrest *in rem* at the time a cargo claim arose, although if the vessel sank that may not be a practical possibility. The fact that the claim arises in consequence of the vessel being lost does not preclude the owner of cargo that was lost with the ship from proceeding against an associated ship. However if the owner of the ship carrying the cargo is not personally liable for the claim of the cargo owner because, for instance, it is not the contractual carrier and no claim in negligence or bailment lies against it, then it is not possible to pursue an associated ship claim unless the person liable to the cargo owner on its claim is the charterer or sub-charterer of the vessel. In other words in order to pursue a maritime claim by way of an action *in rem* against an associated ship the claim must be a claim giving rise to a maritime lien against the ship concerned or a claim that lay against the owner of the ship concerned because that owner was personally liable in respect of such claim<sup>68</sup>.

(b) **Does the maritime claim give rise to a maritime lien or is it one that lies against the owner or charterer of the ship in relation to which the maritime claim arose?**

The first requirement for the arrest of the ship concerned is that either the claim is one giving rise to a maritime lien or is one in respect of which the owner of the ship concerned is

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<sup>68</sup> 'Heath Boat HCAJ 000/2005 available at [http://www.hku.hk/law/faculty/\\_file/Judgment%202%20December%200005.pdf](http://www.hku.hk/law/faculty/_file/Judgment%202%20December%200005.pdf)

<sup>68</sup> S3(4) of the Act. The recognition in cases such as *Dias Compania Naviera SA v The Al Kaziemah* 1994 (1) SA 570 (D) 574; *Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C) at 68-69 and *The Tao Men v Degueldere* 1996 (1) SA 559 (C) 565C-F that there may be other instances in which an action *in rem* may be available does not affect matters. Those were cases dealing with the vindication of ownership in a vessel in which the requirements of s3(4) were clearly inapplicable yet it was held that an action *in rem* was available.

personally liable to the claimant.<sup>69</sup> Insofar as maritime liens are concerned the proper interpretation of this expression in the Act limits such liens to those liens that were recognised in English admiralty law in 1983.<sup>70</sup> This limits the claims under this head to claims relating to salvage, collision damage, seaman's wages, bottomry, master's wages and master's disbursements. Apart from claims of that type, which may arise without the personal liability of the owner of the ship, an action *in rem* against a ship in respect of which a maritime claim has arisen can in general only be brought if the owner of that ship is personally liable in respect of the claim.<sup>71</sup>

In the case of a chartered ship where the claim lies against the charterer or sub-charterer, the claim would lie against the ship concerned but for the fact that the charterer or sub-charterer is not the owner of the vessel in respect of which the claim arises. The effect of the deeming provision in section 3(7) is to place claims against charterers and sub-charterers on the same footing as claims against the owner of the ship concerned. However, this is subject to the qualification that the claim must be one for which the charterer or sub-charterer, and not the owner of the vessel, is alleged to be liable. The oddity of this restriction has already been mentioned. It does however also pose certain problems of interpretation. In the first instance must the claimant specifically allege that only the charterer or sub-charterer is liable in respect of the claim? Would it be a proper defence to such a claim for the charterer to admit its own liability but to plead that the owner of the vessel was also liable in respect of the claim? On whom would the onus of proof then lie? The section itself gives no indication of how to answer these questions and fortunately they do not appear to have arisen in practice. It is tentatively suggested that it should be for the defendant to show that its own liability is concurrent with the liability of the owner. The reason is the pragmatic one that a party whose liability is otherwise established

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<sup>69</sup> S3(4) of the Act.

<sup>70</sup> *Transol Bunker BV v MV Andrico Unity and others; Grecian-Mar SRL v MV Andrico Unity and others* 1989 (4) SA 325 (A).

<sup>71</sup> S3(4) of the Act. The exceptions appear to be limited to claims arising in relation to the ownership or possession of the vessel.

should not lightly be permitted to escape that result for technical reasons unconnected with that liability.

The description of the liability of the charterer as 'concurrent' with that of the owner points to a more difficult issue that may arise from this restriction in section 3(7) on the ability to arrest an associated ship in respect of the claim against the charterer. It is to determine when a claim is one against the charterer or sub-charterer 'and not the owner'. Must the claims be concurrent in the sense that the same cause of action is relied on and the liability of owner and charterer is joint and several or is it only necessary that the claim is directed at securing the same or substantially the same relief? Take the obvious example of a cargo claim where the cargo is either lost or damaged. The owner or party interested in the cargo may be entitled to proceed on a bill of lading against the charterer where the bills are charterer's bills. However where the charter was a time or voyage charter it may be entirely permissible for the cargo owner to claim against the owner of the vessel in delict (tort) on the basis that the loss was caused by the negligence of the crew in failing properly to care for the cargo. Conceivably both claims may be good but the legal basis for each is entirely different as the one is a claim in contract and the other a claim in delict. The one depends upon the carrier's failure to carry the goods in accordance with its obligations under the contract of carriage evidenced in the bill of lading, whilst the other is dependent upon negligence. However both arise out of substantially the same occurrence and are directed at recovering the same loss. For the purposes of section 3(7) therefore the question arises whether this is a single claim for which the owner and the charterer are both liable or whether there are two separate claims? The answer may significantly affect the claimant's ability to recover in respect of its loss.

There are sound practical reasons why in that situation the cargo owner will wish to be able to pursue its claims against both the charterer and the owner of the vessel. For example it may be uncertain of the financial stability of one of the two or both of them. If both owner and charterer are parties to the litigation, that may also assist in bringing about a settlement of the claim. If the ship concerned is available to be arrested it may be arrested in respect of the claim against the owner. However if the claim against the owner is taken to be the same claim as the claim against

the charterer, in the sense of the claim being one for which the owner is liable, then it will not be possible to arrest a vessel owned by a company that is controlled by the charterer<sup>72</sup>. Nonetheless such a ship will be capable of being arrested as an associated ship if the owner of the ship concerned is not liable for the claim against the charterer. It is important in that situation to determine whether the claim against the charterer is the same claim as the claim against the owner.

Again this is not an issue that has thus far arisen in practice so that any answer to the problem is necessarily tentative. Two factors seem to be relevant. Firstly the purpose of the deeming provision in section 3(7) is to make it easier for persons having claims against charterers to find vessels that can be arrested for the purpose of commencing an action *in rem* or in order to obtain security under section 5(3) of the Act for their claims. The section is thus remedial in purpose and should not be given an interpretation that has the potential to stultify this legitimate purpose. Secondly there does not appear to be any clear reason for limiting the claimant's right to invoke the deeming provision in these circumstances, whatever the reason may be for doing so when the claim is one for which the owner and the charterer are jointly and severally liable. It is accordingly submitted that where the claims against the owner and charterer are legally distinct and do not give rise to joint and several liability they should not be treated for the purposes of section 3(7) as being a single claim for which both owner and charterer are liable. Applying the same reasoning it is submitted that if the claimant wishes to claim against the owner and the charterer in the alternative, as would be the case where it was uncertain which of them was the contractual carrier under the bill of lading - a question that may pose substantial difficulties - it is entitled to invoke section 3(7) in order to arrest a ship owned by the charterer or one owned by a company that is controlled by the charterer or controlled by a company that controlled the charterer at the time the claim arose.

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<sup>72</sup> A ship owned by the charterer could not be arrested *in rem* because it would not be the ship against or in respect of which the claim lies. It would however be susceptible to attachment *ad fundandam et confirmandam jurisdictionem*.

(c) **Who was the owner or charterer of the ship concerned when the maritime claim arose?**

The underlying concept of the associated ship jurisdiction is that liability for a maritime claim should be visited on the person or persons for whose benefit the operations of the vessel in respect of which the claim arises tenures. The ‘ purpose of the Act was to make the loss fall where it belonged by reason of ownership, and in the case of a company, ownership or control of shares’.<sup>73</sup> Where the claim is one that lies against the charterer of the vessel the same principle applies in consequence of the deeming provision in section 3(7). It follows that it is essential to the arrest of an associated ship that the claimant identify either the owner of the ship in respect of which the claim arose at the time that claim arose or, where reliance is placed on section 3(7), the charterer at the time that the claim arose. There is a separate and special question in regard to identifying when the maritime claim arose which will be dealt with in sub- paragraph (g) below after the fundamental questions in regard to association, but for present purposes it will be assumed that the date upon which the claim arose is readily identifiable and our focus will be on identifying the owner or charterer at that time.

Where the claim gives rise to a maritime lien or is a claim for which the owner of the vessel is personally liable as required by section 3(4) the focus falls upon the ownership of the ship concerned at the time that the maritime claim arose. The same theme is carried through into section 3(7)(a) of the Act. There is no definition of owner in the Act but clearly it bears the same meaning in both sections. It is submitted that in the provisions of section 3(7)(a) of the Act ownership means legal ownership, that is possession of the legal rights that ownership confers upon a person. As Shaw has pointed out<sup>74</sup> the distinction that may be drawn in English law between beneficial or equitable ownership on the one hand and legal ownership on the other is not one that is recognised in South African law. It is therefore improbable to think that the South

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<sup>73</sup> *Euromarine International of Mauren v The Ship ‘Berg’* 1986 (2) SA 700 (A) 712A.

<sup>74</sup> Shaw, *op cit*, 32.

African legislature used the expression ‘owner’ in any sense other than that in which it is understood by South African lawyers. It is submitted therefore that the reference to the owner of the ship concerned is a reference to the legal owner<sup>75</sup>.

Under the laws of most maritime states the ownership of vessels flying the flag of that state is reflected in a register and procedures are prescribed for securing the entry in the register of ships of that country. Likewise ownership is ordinarily transferred by registration of the transfer in accordance with the bill of sale.<sup>76</sup> Ordinarily therefore the person reflected in the relevant ship’s register as the owner of the vessel will be the owner of the ship. However there may be exceptions to this rule as where a registration has been effected unlawfully and is to be regarded as void or where the registration was fraudulently procured or does not reflect the true situation<sup>77</sup>. In those cases it may be permissible to go behind the registration to identify the true legal owner of the vessel. In other words the fact of registration is not necessarily decisive of the question of ownership.

In principle the same should be true of a situation where the registration in the registry is in the name of a nominee for the true owner. This situation is one that is well recognised in various circumstances in South Africa. Thus it is commonplace for the owner of shares to register those shares in the name of a nominee.<sup>78</sup> It is capable of being applied in any situation where the fact of

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<sup>75</sup> It is submitted that the considerations that troubled Donaldson MR in *The Evpo Agnic* [1988] 3 All ER 810 (CA); [1988] 2 Lloyd’s Rep 411 (CA) and that lead him to hold that in the English statute the reference to ‘owner’ was a reference to the registered owner are not applicable in South Africa where there is no distinction between legal and equitable ownership. The better approach is that of the Federal Court in Australia in *Tisand (Pty) Ltd and others v The Owners of the Ship MV ‘Cape Moreton’ (ex ‘Freya’)* [2005] FCAFC 68; (2005) 143 FCR 43 where it was held that ‘owner’ in s17 of the Admiralty Act was the legal owner after an exhaustive analysis of all possible contrary contentions but essentially following a line of reasoning similar to that in the text.

<sup>76</sup> See for example Chapter 4 of the Ship Registration Act 58 of 1998 and section 3 of Schedule 1 to that Act..

<sup>77</sup> In *The Able Monarch: Prestige Splendour SDN BHD v Globe Engineering Namibia (Pty) Ltd*, SCOSA B135, it was held on an examination of the facts that an alleged sale and transfer of the vessel had been procured solely for the purpose of avoiding an arrest and was a simulated transaction that should be ignored.

<sup>78</sup> *Bell’s Trust v C.I.R.*, 1948 (3) SA 480 (AD) 489; *Sammel and others v President Brand Gold Mining Company Ltd and others* 1969 (3) SA 629 (A) 666C-E; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 453A-B.

registration is not decisive of the question of ownership. This is clearly recognised in the registration provisions of the Ship Registration Act<sup>79</sup>, which expressly deal with a situation where ownership passes other than by way of registration under the Act. In the case of the registration of a South African ship further recognition is given to the notion that registration is not necessarily decisive of ownership under section 32 of that Act which provides that a person having a beneficial interest in a ship will be held liable for any pecuniary penalty payable in terms of the Shipping Acts<sup>80</sup>. Lastly it is permissible in South Africa to register a vessel in the ownership of the bareboat charterer.<sup>81</sup> In each of these instances the true legal owner is not in fact the registered owner of the ship.

Accepting that there are these instances where registered ownership and actual legal ownership may differ it is submitted that a claimant must identify the true owner of the ship concerned at the time the maritime claim arose before any question of association can be considered. This will ordinarily be the registered owner but may be the beneficial owner if the registered owner is a nominee or may be some other person if there are legitimate grounds for challenging the validity of the registration.

The language of the various sub-sections of section 3(7)(a) of the Act is such that in order to invoke its provisions it is essential that a single owner of the ship concerned be identified. The phrase used in each sub-section is 'the owner of the ship concerned' or 'which owned the ship concerned'. This is not language that is capable of being construed as referring to more than one person unless they are acting jointly and can for the purposes of the section be treated as one. The point is that the section does not contemplate that there can be two separate parties both of whom

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<sup>79</sup> Section 4 of Schedule 1 of Act 58 of 1998.

<sup>80</sup> In terms of s1(1) 'Shipping Acts' means the Merchant Shipping Act, 1951, the Marine Traffic Act, 1981 (Act No. 2 of 1981), the Marine Pollution (Control and Civil Liability) Act, 1981 (Act No. 6 of 1981), the Marine Pollution (Prevention of Pollution from Ships) Act, 1986 (Act No. 2 of 1986), the Marine Pollution (Intervention) Act, 1987 (Act No. 64 of 1987), and this Act

<sup>81</sup> S16(c) of the Ship Registration Act 58 of 1998.

are the owner of the vessel simultaneously, such as the registered owner and the beneficial owner. The language of the section dictates that in that situation – which is by no means rare - one of the two must be identified as owner for the purposes of the section. The section provides no mechanism under which both can be treated as owner at the same time. It is submitted that what the section requires is that the actual or legal owner of the ship concerned be identified as at the time when the maritime claim arises. It is open to a claimant to allege and prove - the burden of proof being upon it - that legal ownership of a vessel vests in either the registered owner or some other person on the basis that the registration does not truly reflect the ownership position. It is equally open to a person identified as owner on the basis of registration to demonstrate that they are not in fact the owner, because they are merely a nominee or because ownership has passed to another but is not yet reflected in the ship's registry.

Identification of the owner of a vessel may be relatively straightforward in the light of the international system of registration and resources such as international publications that contain lists of shipowners. Identification of the charterer of the vessel may be more difficult as that is a matter of contract and the claimant may not have access to the charterparty that discloses the identity of the charterer at the time the claim arose. However if the claimant wishes to invoke the deeming provision in section 3(7) of the Act it is necessary that they provide evidence of the identity of the charterer at the time the claim arose. It does not appear to matter for the purposes of applying the presumption whether the charterer is a time, voyage or demise charterer or whether they are a head or a sub-charterer. The question is whether they are the charterer of the ship concerned at the time the claim arises and whether they are personally liable on that claim.

(d) **Who is the owner of the associated ship at the time when the action is commenced?**

The next step in the process is to identify the owner of the vessel that is to be arrested as an associated ship as at the date of commencement of the action. In this regard there is little to be added to the discussion of ownership in the previous paragraph. Each of the sub-sections of section 3(7)(a) starts with the word 'owned' in relation to the putative associated ship. Each is concerned with ownership at the date of the arrest of the vessel as an associated ship. For the



reasons already given it is submitted that this refers to the legal owner. This will ordinarily be the registered owner of the vessel but there are occasions on which registration will not be definitive of this issue. The enquiry is in all respects the same as the enquiry into the ownership of the ship concerned.

There is however a question in regard to the identification of the date of commencement of the action, which is highly relevant for the purpose of determining whether a ship is an associated ship and therefore susceptible to arrest. In section 1(1) of the Act it is now provided that an admiralty action commences 'for any relevant purpose' in one of four ways, namely by the service of any process by which that action is instituted; by the making of an application for the attachment of property to found jurisdiction; by the issue of process for the institution of the action *in rem* and by the giving of security or an undertaking as contemplated in section 3(10)(a) of the Act. For present purposes the second of these can be disregarded. In any action *in rem* however the other three may all occur and the order in which they do so may vary. Thus the summons may be issued and then served together with the warrant of arrest and thereafter security may be given in terms of section 3(10)(a). Alternatively a summons may be issued and then security furnished without the need for the issue of a warrant of arrest. Another possibility is that security may be given in order to prevent an arrest and the summons is then only served or even issued and served at some later stage. In that situation the only arrest is the deemed arrest arising from the giving of security.

One approach to these provisions is to say that the sequence is irrelevant and therefore that whichever event one occurs first marks the commencement of the action *in rem*. That will be either the issue of summons or the giving of security if that occurs before summons is issued. In any case where the vessel is actually arrested the summons will have been issued prior to the arrest. In most cases the question will not matter but where the issue of the summons is the first thing to occur and there is a change in ownership of the associated ship (or even the ship concerned when that is the target of the action) between the date when the summons is issued and the date when it is served or security is given the effect could be significant at two levels. The

first relates to the applicability in South Africa of the judgment in *The Monica S*<sup>82</sup> in which it was held that the security interest afforded to a claimant by the statutory right to arrest the vessel in an action *in rem* accrues on the issue of the writ (summons in South African procedure) and continues to exist notwithstanding the passing of ownership of the vessel to a new owner in the period before the vessel is arrested. That issue will be discussed later<sup>83</sup>. The second issue, more pertinent for present purposes, is whether for the purposes of an associated ship arrest the proceedings are commenced by the issue of a summons even though it is not served until some later stage when the vessel enters a South African port. If that is so then the relevant date for the purpose of determining whether the two vessels are associated will be the date of issue of the summons and a change in ownership between that date and the date upon which the summons is served and the vessel is arrested will be immaterial. This has fundamentally important consequences because it has the result that the underlying link that serves as the factual justification for the associated ship jurisdiction, namely the fact of common ownership of the two vessels or common control of the companies owning the vessels, is broken at the critical stage when effect is given to the jurisdiction by arresting the associated ship. That is not only undesirable but it has constitutional implications once it is recognised that an arrest involves a deprivation of property falling within the protective ambit of section 25(1) of the Constitution.<sup>84</sup>

It is submitted that this brings into play the principle of constitutional interpretation that, where a statute is capable of two interpretations, the one being constitutionally compliant and the other not, the one that is constitutionally compliant is to be preferred. That is feasible in applying the provisions of section 1(2) of the Act to the question when the action is commenced in the case of an associated ship arrest. The starting point is to say that the section itself recognises that there may be different purposes under the Act itself for which the commencement of the action may be relevant. The section does not say that the four cases it gives are applicable for all purposes but only 'for any relevant purpose'. In saying that it is submitted that the section recognises that for

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<sup>82</sup> *The Monica S* [1967] 3 All ER 740 (QBD).

<sup>83</sup> In chapter 12.

<sup>84</sup> See the discussion of the constitutional implications of the decision in *The Heavy Metal* in chapter 9 where it is concluded that the arrest of a vessel as an associated ship when there is no link between the owner of that vessel and the owner of the ship concerned at the time when the maritime claim arose is constitutionally impermissible.

different purposes a different commencement date may be relevant. Under the Act the time of commencement of proceedings is relevant for the purposes of prescription, the operation of statutory and contractual time bars, expedition in pursuing a claim<sup>85</sup> and the ranking of certain claims against a fund. These different contexts may demand a difference in approach to the question of when the action is commenced.

It cannot be said that the issue of summons is now the sole relevant date as held in *The Jute Express*<sup>86</sup> because the holding in that case has been altered by the amendments introduced in 1992. The argument in *The Jute Express* revolved around the question whether the action *in rem* had commenced by the giving of security to prevent the arrest of the vessel, in which event suit had been brought for the purposes of the time bar in the Hague Rules or whether it could only be commenced by the issue of summons, security having been given but no summons having been issued within the period of the one year time bar in the Hague Rules. It was there held that the action commenced by the issue of summons and not by the obtaining of security so that the claim was time barred, but that has been altered by the inclusion in section 1(2) of the Act of the furnishing of security as one of the dates upon which an admiralty action can commence. That amendment would alter the result of that case.

One must therefore strive to make sense of the reference in the preamble to the section of the words ‘for any relevant purpose’. These words replaced the words ‘for the purposes of any law, whether of the Republic or not, relating to the prescription of or limitation of time for the commencement of any action, suit claim or proceedings, an admiralty action shall be deemed to have commenced’, that clearly limited the scope of the deeming and confined its area of operation. The amendment makes the provision generally relevant and provides alternatives that are inconsistent and as already remarked can occur in the same case and in varying order. There

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<sup>85</sup> *MT Cape Spirit: Owners of the cargo lately laden on board the mt Cape Spirit and others* 1999 (4) SA 321 (SCA).

<sup>86</sup> *MV Jute Express v Owners of the cargo lately laden on board the MV Jute Express* 1992 (3) SA 9 (A). Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa*, 62, fn 93 says that the decision in *The Jute Express* applies equally to the amended section, but it is difficult to see how that can be bearing in mind that the very instance that the court rejected as constituting a commencement of the action *in rem* is now included as such a commencement in the amended s1(2).

appear to be two possible approaches to this. The first is to say that any particular action commences when the first event identified in the section occurs so that there is a 'once and for all' aspect to the commencement of an action and once it has commenced that date is immutably fixed. The other approach is to say that the opening words of the section permit of different dates of commencement being fixed for different purposes so that one must identify the date that is most pertinent to the issue under consideration.

It is submitted that in order to avoid the constitutional difficulty the latter and more flexible approach is to be preferred. That has the consequence that the proper interpretation of section 1(2) in the context of the commencement of an action *in rem* against an associated ship is that the action commences either on the date upon which the process instituting that action is served, which date will coincide with the arrest of the vessel, or on the date of its deemed arrest being the date upon which security is given. On that basis in the case of an associated ship arrest the necessary link between the ship concerned and the associated ship will always be present at the time of arrest and the problem that would be occasioned by saying that the action commenced when the summons was issued will be avoided. It must be recognised that this approach probably renders fruitless the practice of issuing a 'protective' summons the purpose of which is to try and obtain a security interest against the vessel that will continue in force notwithstanding a change in ownership.

The suggested approach does however mean that the identification of a vessel as an associated ship will be the same in the case of an arrest for the purposes of an action *in rem* as for a security arrest under section 5(3) of the Act. The same definition of an associated ship applies to both cases but the security arrest is an independent 'stand alone' procedure that starts and finishes with the arrest itself. Section 1(2) does not appear to apply in that case inasmuch as it applies in the case of an 'admiralty action' and that is defined as 'proceedings in terms of this Act for the enforcement of a maritime claim ... and includes any ancillary or procedural measure, whether by way of application or otherwise, in connection with any such proceedings.' A claim for security under section 5(3) is not a maritime claim as defined. Whilst it is 'ancillary' in the sense that it is related to proceedings for the enforcement of a maritime claim those proceedings

are by their very nature not proceedings ‘in terms of this Act’ for the enforcement of a claim. Accordingly section 1(2) does not appear to be of assistance in determining when the ‘action is commenced’ for the purpose of a security arrest. The question is then when the action commences in the case of a security arrest. It is submitted that it is either when the order for the arrest of the vessel is served or when security is furnished to prevent her arrest. That at least leads to consistency. It ensures that the position of the claimant is not different if it arrests the vessel than it would be if it demanded and obtained security. It is unsatisfactory to postulate that the action is commenced by the issue of papers in the application for arrest as opposed to the arrest itself. Such an application can be brought some time before the vessel is due to enter a South African harbour and circumstances may alter as time passes. That is avoided if the approach is that the vessel must have been arrested or that its arrest has been forestalled by the furnishing of security. In other words both the issue of papers and service of the order are necessary to say that the action to obtain security has commenced.

This approach is consistent with the underlying factual justification of the associated ship arrest and it avoids any constitutional difficulty in the application of the provision. It is suggested that it is the proper approach to this issue although it must be noted immediately that it has implications for the nature of the action *in rem* that will distinguish the South African model from its English origins.

(e) **Are the two ships owned by the same person?**

The first basis for an association to exist is that the ship concerned and the associated ship were owned at the relevant times by the same person.<sup>87</sup> In view of the definition of a company in section 3(7)(b)(iii) it is submitted that the reference to ‘a person’ is a reference to a natural person as the definition appears to be comprehensive insofar as any corporate body is concerned or any

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<sup>87</sup> Section 3(7)(a)(i) of the Act.

body of persons, corporate or incorporate<sup>88</sup>. That approach avoids what would otherwise be an anomaly. If a company is treated as a person for the purposes of s3(7)(i) then in the (admittedly unlikely<sup>89</sup>) situation of two different ships being owned by the same company at the relevant times, but the shareholding of the company having changed entirely in the interim, the ships would be associated even though they would not be if one looked at them as being owned by separate companies and examined who controlled them at the different stages that are relevant for the purposes of association<sup>90</sup>. An association in that situation would be entirely contrary to the purpose of the associated ship jurisdiction. However if the same natural person owned the two ships at the relevant times then no such anomaly arises<sup>91</sup>. They are associated for the purposes of the Act and the associated ship can be arrested in an action *in rem*.

That conclusion means that the associated ship will also be capable of being arrested in order to provide security for the maritime claim in proceedings against the ship concerned or its owner, whether in or out of South Africa and whether before a court or an arbitral tribunal<sup>92</sup>. This has the curious result that if the arrest is for the purpose of commencing an action *in rem* in South

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<sup>88</sup> Shaw, *op cit*, 39 suggested that 'person' would, by virtue of the provisions of s 2 of the Interpretation Act, 33 of 1957, include a foreign company not having a share capital. However the amendments have done away with that issue and there is now a definition of 'company' that is comprehensive. The point is probably academic.

<sup>89</sup> The situation could arise in the following circumstance involving an adaptation of the facts in *Gericke v Sack* 1978 (1) SA 821 (A). A speedboat S, owned by company A, is used for recreational purposes by someone unconnected with the company for whose actions it cannot be said to be vicariously liable. The user is responsible for an accident in which someone is badly injured although there is no physical contact between the speedboat and the injured person, as might happen if another boat towing a person water-skiing was forced to take evasive action because of the way the speedboat was being driven. The speedboat is then sold and a new one T purchased. Thereafter X the sole shareholder in company A emigrates and rather than sell the boat sells the company to Y, who knows nothing of the earlier incident. The injured party then wishes to institute a claim for damages. That person has a maritime lien over S but no claim against its owner A personally. However as the claimant could have arrested S in an action *in rem* on the basis of the maritime lien it can arrest T as an associated ship because it is a vessel owned by A at the time of the arrest. This is harsh on Y and not what the associated ship provisions are aimed at.

<sup>90</sup> In that event the company owning S was controlled by X at the time the claim arose. The company owning T will be controlled by Y when the arrest is sought. On that basis the requirements for association would not be satisfied.

<sup>91</sup> This would be the position if X continued to own company A at the time of the arrest of the new speedboat T.

<sup>92</sup> Section 5(3)(a) of the Act.

Africa that action proceeds as a separate action *in rem* against the associated ship<sup>93</sup>, but if the arrest is for the purpose of obtaining security for a claim then the security will be for proceedings against the ship concerned or its owners or charterer and not against the associated ship or its owners. However that is the consequence of permitting the arrest of an associated ship to obtain security for the purpose of pursuing a claim in some other jurisdiction or before some other forum. It is for that reason that care must be taken that security furnished in response to or to avert an associated ship arrest is security for the specific claim that gave rise to the arrest and no other claim.

It is relatively unusual to encounter a situation where the same person owns two ships. That is the classic sister ship situation of the Arrest Convention and as has been pointed out all too frequently the phenomenon of the ‘one-ship’ company has rendered that type of arrest largely obsolete<sup>94</sup>. There is no reported case where the provisions of section 3(7)(a)(i) have had to be considered by the courts. It is more likely to be invoked in minor cases where a natural person owns say a yacht and a motor boat, rather than in any case involving conventional sea-going vessels. Whilst it may occasionally happen that a company owns more than one vessel even that situation has become relatively unusual. The ordinary situation encountered in practice at present is one where the vessels are owned by separate companies. That is the situation that will now be addressed.

(f) **Were the ship-owning companies controlled by the same persons at the relevant times?**

The alternative basis for association (and that most frequently encountered in practice) is that the same person or persons controls both the company owning the ship concerned and the

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<sup>93</sup> *Euromarine International of Mauren v The Ship ‘Berg’* 1984 (4) SA 647 (N).

<sup>94</sup> There are still examples of sister ships in national fleets such as that of the Republic of India (*Indian Endurance, The (No. 2), Republic of India and another v India Steamship Company Limited* [1997] 4 All ER 380 (HL); [1998] 1 Lloyd’s Rep 1 (HL)) and the former Polish fleet (*The Tatry* (C-406/92) [1994] ECR I-5439). Another well-known case involving a sister ship arrest was that of *The Nordglimt* [1987] 2 Lloyd’s Rep 470 (QB (Adm Ct)) but these instances are few and far between.

company owning the associated ship. Thus the key issue in most cases of associated ship arrests is to identify the person who controls, or the persons who control, the companies that own the two ships in question. This is the case of the true associated ship in that the right to arrest, and hence liability for the claim, depends not upon an arrest of the assets of the original debtor but upon the arrest of an asset owned by a different legal *persona*. Three situations are contemplated by sections 3(7)(ii) and (iii). They are where the ship concerned is owned by a company and the associated ship by a person (s 3(7)(ii)); where the ship concerned is owned by a person and the associated ship by a company and where both ships are owned by companies (s 3(7)(iii)). The last of these is the most common.

It will be apparent that in each case where one of the ships is owned by a company it is necessary to determine who controls that company at the relevant date. This will be the date when the maritime claim arose in the case of the ship concerned and the date of commencement of the action in the case of the associated ship. In any case where the claimant relies on the presumption in section 3(7)(c) it is necessary to determine who controlled the charterer when the maritime claim arose. This is the same enquiry as arises in a case where the maritime claim gives rise to a maritime lien or is a claim that can be enforced personally against the owner of the ship concerned. It is also the same enquiry that arises in every instance in relation to the associated ship. The enquiry is a matter of fact in each case. It can raise a number of different issues. Some of these have already been mentioned briefly above but most remain controversial and the whole topic will be dealt with in the next chapter. For present purposes it is sufficient to say that if the companies owning the ship concerned and the associated ship are controlled by the same person at the relevant times there will be an association. The circumstances in which that will be the case are dealt with in chapter 7. Before we turn to that however there is an important ancillary issue that arises in some cases that impacts upon the issue of common control of the ship concerned and the associated ship and that is the issue of when the claim arises.

(g) **When does a claim arise?**

Ordinarily the precise date upon which a claim arose will be of little significance when considering issues of association. It serves at most as marking the point at which the enquiry as to



ownership of the ship concerned must be undertaken, but the actual date is unlikely in itself to create any difficulty. Its primary relevance is likely to be in relation to prescription and the ranking of claims. However the requirement that the ship concerned be owned *at the time the maritime claim arose* does create difficulties when the cause of action of the claimant arises from a sale of the ship concerned to the claimant.<sup>95</sup> The problem is created in part by the law of purchase and sale and in part is an issue of the proper interpretation of the Act. The difficulty is not simply that the purchaser usually only becomes aware of the fact that it has a claim once it has taken transfer of the ship, but that its claim will ordinarily only come into existence at that point in time. There are several cases considered below in which this difficulty has arisen.

In the *Fayrouz IV*<sup>96</sup> a ship called the *Jade II* was sold subject to a condition warranting that at the time of delivery it would be free from encumbrances, maritime liens and any other debts. The purchaser was indemnified against any such claims. After the sale and transfer of the vessel a claim giving rise to a maritime lien was asserted against the vessel. The purchaser sought the arrest of the *Fayrouz IV* as an associated ship in order to pursue its claim for an indemnity. Unfortunately there is no discussion in the judgment of the particular problem identified above. The judgment records that it was common cause between counsel that the claim giving rise to the maritime lien arose prior to the sale or the transfer of the *Jade II*. Patently that concession was correct but irrelevant as it was not the claim against the *Jade II* that mattered for the purpose of determining whether the two ships were associated. The relevant claim was the one against the seller, its previous owner, in terms of the indemnity. No consideration appears to have been given as to when that claim arose, but on the face of it no claim to an indemnity could have arisen before the vessel was transferred to the purchaser. It was only then that the seller was in breach of any obligation owed to the purchaser and it was only then, at the earliest, that any claim to an

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<sup>95</sup> The problem could also arise if the claimant was the seller and not the purchaser but that is a far less likely scenario. The reason for that is that any claims by the seller are only likely to arise at the moment of transfer of the vessel sold to its new owner. At that stage the ship concerned will be owned by the person against whom it is sought to bring the action. Accordingly not only the vessel that has been sold but also an associated ship will be able to be arrested *in rem* in respect of the claim. A problem will only arise if the claim by the seller arises before ownership of the vessel sold is transferred to the purchaser, which is unlikely to be the case.

indemnity could have been brought<sup>97</sup>. However without any reference to argument or any reasons it is simply said that the ship concerned - the *Jade II* - was owned by the seller at the time the claim arose. The inference seems to have been that the date when the maritime lien arose was taken to be the crucial date and not the date when the right to an indemnity arose. That being so then the case proceeded on an incorrect approach and cannot be regarded as correctly decided.

In the *Heavy Metal*<sup>98</sup> a similar issue arose and was considered by the Court. Again the context was a dispute arising from the sale of a vessel. The ship that was sold was called the *Sea Sonnet*. The memorandum of agreement provided that the vessel was at the seller's risk until delivery to the buyer. She was to be delivered 'with present class free of recommendations' but subject to an obligation to notify the Classification Society of any matter coming to the knowledge of the purchaser before delivery that would result in class being withdrawn or the imposition of a recommendation relating to her class. It was alleged that when delivered there was a breach of this condition because the vessel had numerous problems known to the seller that should have been reported to its classification society and would have resulted in recommendations being imposed. Again the problem was the time when the maritime claim arose. On behalf of the owners of the *Heavy Metal* it was contended that the claim only arose when the *Sea Sonnet* was delivered in a defective condition. The claimant contended that the claim arose when the vessel was tendered for delivery after the seller had failed to report the defects to the classification society. During the period between the tender of delivery and the acceptance of that tender the purchaser contended that its 'claim must already have arisen against

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<sup>96</sup> *October International Navigation Inc v mv Fayrouz IV* 1988 (4) SA 675 (N).

<sup>97</sup> A right to an indemnity may only arise once the person claiming the indemnity has paid the claim. See *Jonnes v Anglo-African Shipping Co* 1972 (2) SA 827 (A). Even if the right in this case was not postponed in that fashion it is difficult to see on what basis it can be said to have arisen before the vessel was transferred to the purchaser.

<sup>98</sup> *MV Heavy Metal; Palm Base Maritime SDN BHD v Dahlia Maritime Ltd and others* 1998 (4) SA 479 (C).

the first respondent inasmuch as the applicant could have sued immediately for damages for the breach whilst ownership of the vessel was still vested in the first respondent (the seller).'<sup>99</sup>

This argument found favour with the court. It cited with approval the following passage from another judgment:

‘I am of the view that the claim for damages for breach of contract arises when the debtor fails to perform his contractual obligations during the performance of the contract. As the debtor might remedy his prior breach at any stage during the execution of the contract, the right of action will only accrue when the contract has been completed and the debtor *offers* his completed, but defective work as ostensible performance of his obligation.’<sup>100</sup>

On that basis and particularly because of the use of the word ‘offers’ the court held that the claim ‘probably’ arose before ownership of the vessel passed<sup>101</sup>. With respect this is a remarkable conclusion based on a misunderstanding of the issues in the case relied on and the question to which this remark in the earlier judgment was addressed. The case in question dealt with the construction of a tennis court and the court was concerned with the commencement of prescription. No distinction between the tender of defective performance and the acceptance of that tender was relevant to this issue. The problem was that the tennis court had been completed in September 1974 but the defects only manifested themselves the following Easter. Nonetheless the court held that the claim for damages arose in September 1974 when the work was completed. What is also strange is that in the *Heavy Metal* the court did not go on to cite the portion of the judgment immediately following which read:

‘Wessels in his *Law of Contract in SA* at para 2780 states *inter alia* :’It is therefore essential to the defence of prescription that the creditor should *have been entitled* to bring

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<sup>99</sup> This was the applicant’s contention as set out at page 488 E-F. There is nothing in the judgment to indicate the legal basis for this contention. The real difficulty is that the damages for which the claimant was in fact suing had not at that stage been suffered.

<sup>100</sup> *Hawken v Olympic Pools (Pty) Ltd* 1979 (3) SA 224 (T) 227A-B.

<sup>101</sup> It is unclear how an issue of law, viz when a claim arises, can be determined as a matter of probability.

his action at the moment from which the debtor claims that prescription runs in his favour.’

In other words the judge in the tennis court case was concerned simply to apply the well-established rule that prescription commences to run when the cause of action is complete and in that case it was when the tennis court had been laid, albeit that the defects were only discovered later. There was no question there of a gap in time between a tender of performance and the acceptance of that tender.

It is hardly surprising that when the *Heavy Metal* went on appeal<sup>102</sup> the appeal court found it unnecessary to pronounce on the correctness of this passage in the judgment of the court below<sup>103</sup>. It upheld the decision of the court below on the simple ground that, whilst the seller could have remedied its breach at any time before delivery it had to be accepted that any breach that occurred was a breach committed before delivery.<sup>104</sup> It is apparent from the judgment that it was accepted that this conclusion would be decisive of the appeal but it is unclear why that should have been so. The judgment does not deal with the point that what the claimant was seeking to recover was damages arising from the *Sea Sonnet* having been delivered in a defective condition. What it wanted to recover was the cost of remedying the defects. Whilst these defects should have been disclosed to the classification society before delivery and the failure to disclose them was a breach of the sale agreement the crucial question was whether these damages arose from this breach and whether it was necessary that they should have been suffered in order for the claim to have arisen. This issue is not dealt with in the judgment nor was it raised or dealt with in argument.

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<sup>102</sup> *MV Heavy Metal: Belfry Maritime Ltd v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA).

<sup>103</sup> Para 53, 1099D.

<sup>104</sup> Para 53, 1099B-D. In other words it did not draw a distinction between the tender of delivery and delivery itself.

The applicant for the arrest had accepted delivery and elected not to resile from the sale<sup>105</sup>. The claim for damages that it intended pursuing in arbitration proceedings was dependent on such acceptance, as until it accepted the vessel it had not suffered the damages that it was trying to recover. This should have created an obstacle in the path of the court's conclusion. The difficulty was that until delivery had been accepted by the purchaser it had not suffered any damages at all, even though the breach on which it purported to rely had occurred prior to delivery. Applying basic principles of causation the failure to report defects to the vessel's classification society prior to delivery would not have given rise to the damages it now sought to recover.<sup>106</sup> The claimant may have had a cause of action before delivery had it discovered the breach prior to that taking place, but that cause of action would have been for specific performance or for cancellation and damages, but not for the damages that it was actually seeking to recover, namely the cost of remedying the defects in the vessel. The claim that was to be pursued against the seller and in respect of which security was being sought was a claim arising from the fact that the vessel was defective when delivered, not one flowing from the failure to report defects to the Classification Society.

The issue arising from this is to determine when a claim arises for the purpose of the section. Care must be taken not to confuse this question with the question when a claim arises for the purposes of prescription although reference will need to be made to cases dealing with that topic. The need for caution arises from the fact that we are dealing with an expression in a South African statute and the primary issue is the meaning to be given to it in that statute. That meaning will apply irrespective of the legal regime governing prescription of the claim, which may vary depending on the legal system that governs the claim.<sup>107</sup> It would be inappropriate for the

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<sup>105</sup> See judgment in the court *a quo*, 483F-G.

<sup>106</sup> *International Shipping Co Ltd v Bentley* 1990 (1) SA 680 (A) 700E - I. Whilst that case dealt with a delictual claim the approach to causation has been held to be applicable in other fields including contract. *Napier v Collett and another* 1995 (3) SA 140 (A) 143E-144B; *Extel Industrial (Pty) Ltd and another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA)

<sup>107</sup> *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA)

meaning of a provision in a South African statute to vary depending on the vagaries of foreign laws governing prescription. The only legal system governing prescription that may be relevant will then be that of South Africa and then only for the light that it can cast upon the meaning of the expression ‘when the maritime claim arose’.

Ordinarily a claim cannot be said to have arisen unless there is a cause upon which the claimant can sue. In this regard there is ample authority that a claim for damages is not complete in South African law until damages have actually been suffered. It suffices in this regard to quote the well-known passage from the judgment of Watermeyer JA in *Oslo Land Co v Union Government*<sup>108</sup>:

‘The plaintiff’s claim in this case is founded upon an allegation of negligent conduct during the months of February, March and April, 1934; that is, upon wrongful acts complete and finished when the spraying was completed. It is an action for damages for negligence under an extension of the *Lex Aquilia*, and the right of action in such a case is complete as soon as damage is caused to the plaintiff by reason of the defendant’s negligent act (see *Union Government v Warneke* (1911, A.D. at p. 665); *Coetzee v S.A. Railways and Harbours* 1933 CPD 565). By the word damage is not meant the injury to the property injured, but the *damnum*, that is the loss suffered by the plaintiff by reason of the negligent act (see Grueber, *Lex Aquilia* (p. 233)).

Whilst that was a case of a claim for damages for delictual wrongdoing the same principle applies in the case of contractual damages in South African law<sup>109</sup>. Until there has been loss there is no complete cause of action. Central to the existence of a claim is that the elements making up that claim are all in existence. Where one or more of those elements is missing the claim has not arisen although its future existence may be predictable. However, there may be circumstances in which, even though the claim has arisen because a breach of contract or wrongful act has been perpetrated and loss has been suffered, the ability to pursue the claim is inhibited. This will be so in a contractual situation where the debtor has been given time to pay or in claims against certain

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<sup>108</sup> 1938 AD 584, 588. The position is no different in English law. *Rothwell v Chemical & Insulating Co Ltd* [2006] 4 All ER 1161 (CA), para 19; *Law Society v Sephton & Co* [2006] 3 All ER 401 (HL).

<sup>109</sup> *Swart v Van derVyver* 1970 (1) SA 633 (A) 643C-D and 650F-G; *Escom v Stewarts and Lloyds SA (Pty) Ltd* 1979 (4) SA 905 (W) 908G-909H.

statutory bodies where notice must be given before action can be commenced.<sup>110</sup> In that event while the claim may have arisen it is not due and prescription does not commence to run under the Prescription Act<sup>111</sup>. The SCA has held that the question of when a claim arises under the provisions of section 11 of the Act is determined by asking when the claim comes into existence relying on the meaning of that term as explained in these authorities on prescription.<sup>112</sup> Applying those principles to the question of when the maritime claim arose in the *Heavy Metal* the answer appears to be that there was a breach of contract prior to delivery that could have given rise to remedies such as the right to resile from the contract and claim consequential damages or a refusal to accept the tender of delivery until the defects had been remedied, but that the claim for damages that was in fact being pursued did not arise until after delivery had been taken. In those circumstances ownership had passed when that claim arose and an essential requisite for establishing the association was not present.

A perusal of the judgment suggests that the court's attention was not drawn to this difficulty. In the court *a quo* the argument had been addressed on the basis of when the breach occurred and not when the loss was suffered. The heads of argument filed with the Supreme Court of Appeal on behalf of the appellant did not raise the point but deal only with the question of when the breach of contract occurred and not with whether the claim for damages that was in

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<sup>110</sup> The distinction between a claim being due and a claim having arisen was said to be elementary in *Cohen v Haywood* 1948 (3) SA 365 (A) 371. It was explained by Miller J in *Apalamah v Santam Insurance Co Ltd and Another* 1975 (2) SA 229 (D) 232E - G as follows: 'Although it is true that in many cases the date upon which a debt "becomes due" might also be the date upon which it "arose", that is obviously not true of all cases. There is a vital difference in concept between the coming into existence of a debt and the recoverability thereof. There can be little doubt, if any, that the purpose of the Legislature in enacting s12(1) of the new Prescription Act was to crystallise that difference; thenceforth prescription in terms of that Act began to run not necessarily when the debt arose but only when it became due.'

<sup>111</sup> Act 68 of 1969.

<sup>112</sup> *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and others (Fund constituting the proceeds of the sale of the mv Forum Victory)* 2001 (3) SA 529 (SCA) para 14. Whilst the Court reserved the position under s3(7) there is no apparent reason for distinguishing this section from the identical wording in s11.

issue had arisen at that stage<sup>113</sup>. The only submission made by the appellant was that on a proper interpretation of clause 11 of the MOA there could be no breach until delivery and that it was only on delivery of the *Sea Sonnet* that the maritime claim could have arisen. It is clear therefore that the point was not raised<sup>114</sup> and this has subsequently been confirmed<sup>115</sup>. That explains why the court did not address it in its judgment and why it cannot provide authority for the general proposition that in a case involving the sale of a vessel a claim by the disgruntled purchaser that the vessel was delivered in a defective condition arises before delivery.

The same issue arose in the case of the *Alam Tenggara*<sup>116</sup>. The dispute was one that arose out of the purchase of a vessel, in that case two new buildings, where there was a complaint concerning the suitability of their paint coating for the carriage of particular chemicals. Again the problem was that the two ships concerned passed into the ownership of the purchasers before the

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<sup>113</sup> I am grateful to Michael Posemann, who was the attorney for the successful respondent, for making copies of the heads of argument available to me. His recollection of the argument and that of counsel who appeared in the appeal is that the point was never raised.

<sup>114</sup> Counsel for the respondent appear to have been alive to the point because in their heads of argument they advanced the submission on the basis of *List v Jungers* 1979 (3) SA 106 (A) 121 C-E that it made no difference that the damages only became recoverable after delivery had taken place, because a claim may arise before damages become recoverable. However that case is not authority for this proposition. It dealt with an undertaking to pay a debt and the argument was whether the undertaking was conditional on non-payment by a particular date or whether it was an unconditional undertaking. In the latter event the obligation arose for prescription purposes when the undertaking was given and in the former it only arose once the condition was fulfilled. The case was not concerned with when a claim for damages arose but with when a contractual obligation to pay an amount of money arose. The question of when a claim for damages for breach of contract arose was the issue in the *Heavy Metal* but it was not dealt with by the court. In the light of the approach of the respondent's counsel it seems unlikely that reliance was being placed on the English rule that a breach of contract will always give rise to a right to recover nominal damages even if no damage is suffered. *Chitty on Contracts* (29<sup>th</sup> Ed, 2004) Vol 1, para 26-004, 1427. It does not appear that evidence of foreign law was lead and in any event such a contention would raise other difficulties, not least of which being whether it is permissible to have regard to foreign law on the point or whether the question of when a claim arises under the Act is a matter to be determined by the principles of South African law. In South Africa it is essential for a person claiming damages to allege and prove those damages and in the absence of such proof there is no entitlement to nominal damages. *Steenkamp v Juriaanse* 1907 TS 980.

<sup>115</sup> In *mv Cape Courage: Bulkship Union SA v Qannas Shipping Co Ltd and another* 2010 (1) SA 53 (SCA), para [18].

<sup>116</sup> *MV Alam Tenggara Golden Seabird Maritime Inc and another v Alam Tenggara SDN BHD and another* 2001 (4) SA 1329 (SCA)



causes of complaint were discovered. The contention by the sellers was that the claims only arose once delivery of the vessel had taken place and as this was simultaneous with the transfer of ownership to the purchasers there was never a moment when the claim existed but the vessel remained in the ownership of the seller. In terms of the contract it was expressly contemplated that payment, delivery and the passing of ownership would take place simultaneously. However human affairs can rarely be ordered so exactly particularly when events take place in three different centres across a number of time zones. In the result the crews went on board the vessels a few moments before payment for the vessels was made so it was contended that there was a brief interval during which the seller owned the vessels but the purchaser had a claim. However there was dispute among the experts as to whether ownership passed when physical delivery took place even though payment had not yet been effected. In the result the court held that the claimant purchasers had failed to prove that when their claims arose the vessels were still owned by the sellers and accordingly had failed to prove that the *Alam Tenggiri* was an associated ship in relation to the vessels they had purchased.

Issues such as these will inevitably arise when there is a change in ownership of the ship concerned at much the same time as the maritime claim arises<sup>117</sup>. Usually this will be in a situation where the claim arises from the sale of the vessel and the question will be whether the ship concerned was owned by the debtor at the time that the claim arose. It must be stressed however that this is not indicative of a flaw in the Act. In the majority of instances the precise time when a claim arises will not be of significance to the question of association and the identity of the owner of the ship concerned at that time will be apparent. The issues in these cases arose from the nature of the claims being advanced and the circumstances in which they arose. In the two cases where an arrest was granted and upheld there was no analysis of the different type of claims. In the three where it was seriously debated the arrest was set aside at first instance. The

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<sup>117</sup> They arose in *MV 'Silver Constellation': Ipanema Navigation Corporation v MV 'Silver Constellation'*, A 68/2007 (DCLD); SCOSA C141 where the arrest was set aside on the basis that the claim only arose simultaneously with the passing of ownership. A similar conclusion was reached by the same judge in the *mv 'Cape Courage': Qannas Shipping and another v Bulkship Union SA and another*, Case No A74/2006 (DCLD); SCOSA C124. The latter judgment was reversed on appeal. Both judgments have been followed in *MT 'Active'/ 'A Dragon': Trienergy Transportation Corporation v mt 'Aristidis'*, A70/2007 (DCLD), SCOSA C 149 (D).

matter has now been the subject of a decision by the Supreme Court of Appeal and that decision must now be examined.

(h) **The Cape Courage**<sup>118</sup>

This was another case of the sale of a ship. After delivery the purchaser complained that the vessel was defective in various respects. It accordingly advanced claims for damages (not for cancellation of the sale) based upon breaches of the Memorandum of Agreement (MOA) under which the ship had been purchased. These claims were related to clause 11 of the memorandum (which provided that the vessel should be delivered and taken over in substantially the same condition as when inspected, fair wear and tear excepted), clause 18 (which provided that the vessel should be delivered 'with her present BV class maintained, free of outstanding recommendations and average damage affecting her present class at the time of delivery') and a term implied by s 14 of the English Sale of Goods Act 1979 (as amended) (that the vessel was of satisfactory quality or fit for the purpose for which it was sold)<sup>119</sup>. It sought the arrest of the *Cape Courage* as an associated ship in relation to the vessel that was sold. All of these claims were held to be established at the requisite *prima facie* level and the only question was whether at the time the claims arose in terms of section 3(7)(a) the seller was the owner of the ship concerned. If the purchaser's claims arose only upon delivery of the vessel to the purchaser then the associated ship arrest of the *Cape Courage* was not permissible because it was not owned by a company controlled by the same person or persons as the ship concerned at the time the maritime claim arose.

The competing contentions of the parties were straightforward. The seller contended in accordance with what is set out above that the meaning of the expression 'when the maritime claim arose' fell to be determined by South African law and in accordance with the authorities

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<sup>118</sup> *mv Cape Courage: Bulkship Union SA v Qannas Shipping Co Ltd and another* 2010 (1) SA 53 (SCA).

<sup>119</sup> A further claim based upon misrepresentation was not pursued in the light of the approach of the court although the judgment reaches a conclusion in regard to delictual claims as well as contractual claims.

discussed earlier that only occurred once the purchaser suffered some damage, which could only occur after delivery and the passing of ownership. The purchaser contended that the claim arose when the wrong giving rise to the claim occurred and did not involve the purchaser in having a complete cause of action. Accordingly in respect of a claim based on a breach of contract it is the date of the breach and in the case of a claim based in delict it is the date of the wrong that constitutes the claim having arisen.

The court held that the issue had not been considered in the *Heavy Metal* and should be considered as *res nova*. It distinguished and thereafter ignored its own judgment in the *Forum Victory*<sup>120</sup> where the similar expression in section 11(4)(c) of the Act was construed in accordance with the authorities already mentioned as meaning when a complete claim had come into existence. It did so on the basis of a statement in the earlier decision that:

‘The expression ‘when the maritime claim arose in s 3(7) is perhaps no less ambiguous than the expression ‘claim which arose’ in s 11(4)(c). In these circumstances there would seem little to be gained by interpreting the one, in its different contextual setting, in order to serve as an aid to the interpretation of the other.’

However, that is hardly a sufficient basis for distinguishing the decision. The court in the *Forum Victory* did not say that the two expressions bore a different meaning and it could hardly have done so bearing in mind the general rule of interpretation that where a statute uses the same expression in different sections it will usually intend them to have the same meaning<sup>121</sup>. All that it said was that it was not helpful in resolving the question of the meaning of the expression in the context of the provisions concerning priorities to have regard to the complex provisions concerning associated ships. This does not necessarily mean that when the problem has to be addressed in relation to associated ships there is no need to consider whether any reasons arising from the difference in context dictate that a different meaning should be given to it. It certainly

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<sup>120</sup> *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and others (Fund constituting the proceeds of the sale of the mv Forum Victory)* 2001 (3) SA 529 (SCA)

<sup>121</sup> *Minister of Interior v Machadadorp Investments (Pty )Ltd and another* 1957 (2) SA 395 (A) at 404C-E.

does not mean that the court can simply disregard its own previous decision or the reasons that led it to the conclusion that the meaning of the expression is ‘when a claim comes into existence’ by which it meant that all the elements of the claim had to exist albeit that the claim was not presently enforceable<sup>122</sup>. It must at the least identify the reasons for holding that in the present case the legislature intended a different meaning to attach and this it made no attempt to do. It is also appropriate to bear in mind that the reservation expressed in that case was expressed in the context of an argument that if reference is made to the expression in section 3(7)(c) anomalies would arise if that were construed as meaning that the claim was payable as opposed to merely having arisen. The problem here presented was a contention that a claim could arise when all the elements of a claim had not yet come into existence. That was a novel proposition departing from all previous consideration of similar topics in South African law which one would have thought reinforced the presumption that in using it the legislature did not have in mind a special meaning but one that would be familiar to lawyers practising in this jurisdiction<sup>123</sup> as meaning that the claim had come into existence albeit that it was not yet due.

The court’s reasoning commences with the approval of a view expressed in another unreported matter that the idea of origin is fundamental to dictionary definitions of the word ‘arose’. It went on to say that the expression had been taken over from article 3(1) of the Arrest Convention dealing with the arrest of sister ships and quoted a passage it had cited in the *Heavy Metal* from the decision in *The Banco*<sup>124</sup> in which Lord Denning said that the compromise embodied in the Arrest Convention was between the English rule that only one-ship could be arrested and the European approach that more than one-ship could be arrested. It accepted that the associated ship is different from a sister ship but said that the requirement that the owner or controller of the ship sought to be arrested must be the same as the owner or controller of the ship concerned ‘when the maritime claim arose’ is the same as the provision in article 3(1). However

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<sup>122</sup> Para [16] of the judgment in the *Forum Victory*.

<sup>123</sup> See the *Forum Victory* para [14] where the court made a similar point.

<sup>124</sup> *The Banco* [1971] 1 All ER 524 (PDA and CA) 531; [1971] 1 Ll. L. Rep. 49

the court had not been referred to any international jurisprudence on the meaning of the term and the judge (Farlam JA) had been unable to find any.<sup>125</sup> Then follows the crucial passage which reads as follows:

[23] In my view it is significant that in cases other than those involving maritime liens, where other considerations apply, for a maritime claim to be enforced by an action *in rem* the owner of the property to be arrested must be liable to the claimant in an action *in personam* in respect of the cause of action concerned. When one realises that the owner or controller of the 'offending ship' has to be personally liable on the claim, it becomes clear that it is really inappropriate to speak of the 'offending ship': it is really the 'offending owner' (or controller) who should be looked at because property owned or controlled by it, in the form of another ship, becomes liable to be arrested when the associated ship provision is utilised. It accordingly makes sense, when a claim has 'originated' and enough factors are present to indicate that the owner or controller of the ship concerned at that time (or those for whose actions or omissions it is liable) has 'offended', that another ship owned or controlled by that person when the claim is enforced may be arrested in respect of the claim. Damage resulting from the offending actions or omissions by the owner or controller (or for which it is liable) may not yet have been suffered but if it is clear that it will in due course be suffered, I think that it is not stretching language to say that the claim has 'arisen'. Although the point did not form the subject of the decision in the case it is interesting to note that Gaudron, Gummow and Kirby JJ, in their judgment in *Laemthong International Lines Co Ltd v BPS Shipping Limited* (1997) 190 CLR 181 (H C of A) used the expression 'when the cause of action. arose' in speaking of a date when a breach occurred but before the damages in question were suffered. The case concerned a voyage charterparty for the carriage of a cargo of bagged rice from Bangkok to Nouakchott in Mauritania. The agreement was breached on 8 July 1995 at Bangkok when the charterers failed to ensure proper fumigation of the cargo, leading to the infestation of the cargo by a species of beetle. As a result of this the vessel was arrested in Mauritania and the owners subsequently claimed \$1 833 285 as damages from the charterers in consequence of the arrest, which included interest and the cost of obtaining the release of the vessel and also certain demurrage and dead freight charges alleged to be due under the charterparty. These damages would all appear to have been suffered after the failure to fumigate. Yet Gaudron, Gummow and Kirby JJ said (at 200): '(o)n 8 July 1995, when the cause of action of the respondent against the appellant arose on the respondent's general maritime claim concerning the *Nyanza* ...'

[24] In the circumstances I am satisfied that the appellant's submissions regarding the meaning of the phrase 'when the maritime claim arose' in s3(7)(a) are correct and that it was also correctly submitted that the claims under clauses 11 and 18 of the memorandum of agreement and s 14 of the English Sale of Goods Act 1979 as well as the claims in tort based on alleged misrepresentations all arose when the first respondent was still the owner of the MV 'Pearl of Fujairah'.'

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<sup>125</sup> My research has similarly not uncovered any international case dealing with the meaning of the expression.

The outcome of the case was accordingly that the arrest of the associated ship was sustained. It is suggested with respect however that it is entirely unclear from the judgment on what principled basis the court reached the conclusion that it did or indeed exactly what that conclusion is. To adopt the remarks of Friedman J concerning another decision by that court<sup>126</sup> the conclusion that the court reached does not appear to be deduced from any process of legal reasoning but is rather the result of a policy decision that it would not be appropriate merely because of the fact that the claimant became the owner of the ship concerned under the very transaction giving rise to the claim not to afford it the advantages offered by the associated ship jurisdiction.<sup>127</sup>

One can have little difficulty with the general notion that the origin of the claim is pertinent to the question when the claim arose. However it is not apparent that this insight assists in resolving the interpretational problem. In the first instance its relevance depends upon what one means when one speaks of the origins of the claim. In one sense one may merely be asking the same question in different words, which is generally a pointless and unhelpful exercise, particularly when one is replacing the established legal concept of a claim arising with a notion of origin hitherto unknown to the law. In another sense one is replacing the question of when the claim arose with an abstract question of causation, which is an entirely different matter, not raised by the section. A plant may have its origins in a seed but if the statute requires one to identify at what point it becomes a plant it is simply wrong to ask where the plant has its origins as opposed to when it became a plant. Similarly to ask when the claim had its origins instead of when it arose alters the enquiry and removes it to an unnecessary level of abstraction as appears when one presses the enquiry in rather more detail than did the court.

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<sup>126</sup> In *Thathiah v Khan* NO 1982 (3) SA 370 (D) 375B-C concerning the decision of the then Appellate Division in *Magwaza v Heenan* 1979 (2) SA 1019 (A).

<sup>127</sup> Similar remarks are to be found in the judgment of Nugent JA in *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA) paras [21] and [37] to [39] who cites the Chief Justice's statement in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) para [174] that courts must be careful not to substitute their own policy choices into a statute for those of the legislature. Equally they should not insert policy choices into legislation without the clearest possible indication that those choices coincide with those of the legislature.

The claims in the present case had their origin in the conclusion of the MOA in respect of a vessel that was not fit for the purposes for which it was sold. Whichever way the claim was formulated the same damage was complained of and, as no intervening cause was relied on<sup>128</sup>, this implies that the vessel must have been both out of class and unseaworthy at the time the MOA was entered into. Accordingly the factual foundation for the claims based on the vessel being out of class and unseaworthiness rested upon facts that existed when the MOA was concluded. Why then is that not the origin of the claims? After all that is what formed the substance of the complaint. The likelihood of those claims being brought to fruition and acquiring a monetary component by the delivery and acceptance of the vessel was as great at that stage as when delivery was tendered. Logically that seems to be the appropriate time to speak of if the enquiry is when the claim had its origins. The origins of the claim lay in the deficiencies in the steel plating which had the result according to the claimant that the vessel was sold in an unseaworthy condition and suffering from defects that affected her class. The origin of the claim lay in that fact and the conclusion of the MOA, but it is clearly absurd to speak of a claim based on breach of contract arising when the contract is concluded. Instead the court selected the date of delivery. The point when delivery is tendered is merely a continuation of the events that had their source in the conclusion of the agreement itself. The tender of delivery adds nothing to the identification of the origin of the claim. It is merely an arbitrary point along the continuum of events that started with the conclusion of the MOA. True the act of tendering delivery constitutes the breach of the contract and is therefore a component of the legal claim that will come into existence once damages are suffered. However it is not the origin in any significant practical sense of that claim and nor is the origin of the claim in a legal sense as the conclusion of the MOA and the existence of the defects are all part of the claim in a legal sense. To say that the claim has arisen when the breach occurs is the same as saying that the plant exists when the seed is planted but before it germinates or that the cake exists when the ingredients are placed in the mixing bowl but before it is put in the oven. Whether viewed as a statement of fact in regard to

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<sup>128</sup> As the complaint related to the thickness of the vessel's steel plating it could hardly have been a problem arising after the conclusion of the MOA. It was clearly a pre-existing condition

the claim arising or as a statement of law it is simply wrong because the claim does not at that time exist and whether it will ever exist is dependent upon other later events occurring.

It cannot be stressed too often that a claim is not an abstract set of events but a legal concept and its parameters, and hence whether it has arisen, is a legal question to be answered by an application of the legal principles relevant to the identification and existence of that claim. It is legitimate to ask why one should take the moment of tendering delivery as the key when the problems must on any basis have been extant prior to that? Why is that breach of contract or legal duty critical especially when one has regard to the fact that the seller may breach the contract even though it is not aware of the defects in the vessel giving rise to that breach? After all breach of contract is not a matter of intentional wrongdoing but a case of absolute liability irrespective of the knowledge or intention of the party in breach. The condition of the vessel that forms the basis for the claim must in this case have subsisted at the time of conclusion of the MOA, so that objectively speaking and with the benefit of hindsight a breach was always likely and indeed inherent in the contract itself. To select an arbitrary date at some point in the process of giving effect to the MOA as the date upon which the claim arose as opposed to the date when the claim came into existence is simply arbitrary and not the result of an exercise in statutory construction. On any date that one selects prior to the giving and acceptance of delivery there was no claim in the legal sense of a claim on which the claimant could either then, or at some later stage if the claim was not yet due, recover. The section speaks of the date when a maritime claim arose, but there is no claim at the prior stage identified by the court, merely the potential for a claim to arise at some stage in the future depending on what happens. It cannot be material to answering the issue of statutory interpretation that the claim is very likely to arise. In any event that creates its own difficulties in regard to the date when the claim arose. The section speaks of the claim arising not the likelihood of a claim arising. The excursus into questions of its origins does not assist in the construction of the section. When a claim originates depends upon what one means by a claim and when one is speaking of a claim for damages that claim includes the damages because in the absence of damage, and therefore damages, there can be no claim at all. Any other enquiry is not addressed to the correct question.



The references by the court to the Arrest Convention and the judgment in *The Banco* do not advance the consideration of the issue before it. Accepting for the present that in the borrowing from the Arrest Convention that was admittedly a feature of the drafting of some portions of the Act the draftsman adopted the language of the Convention in speaking of ‘when the claim arose’, that would only be relevant or helpful if there was some settled international meaning attaching to the expression that could guide our courts in construing it. However as the judgment goes on to accept there is no such settled meaning or indeed any authority of which the court was aware that could be of assistance. Nor is there any standard understanding of this expression that could be adopted. All that we know therefore is that if the problem arises in any other jurisdiction they will be in the same position as our courts in interpreting something that has no *a priori* meaning. The court is accordingly on a featureless ocean where the only guides available to it are those provided by its own jurisprudence, which are usually the safest guides when construing a domestic statute. After all it was accepted that this was the task facing the court and that it was a task that fell to be dealt with in accordance with the principles of South African law<sup>129</sup>. One can accordingly discard the Arrest Convention in considering the problem. It is interesting to note that neither side referred to it in either the written or the oral argument before the SCA.

One moves on then to the key passage in the judgment quoted above. It starts with the proposition that in cases other than those involving maritime liens the owner of the ship concerned must be personally liable for the claim. Leaving aside that this statement is incorrect when dealing with an associated ship because it fails to take account of the deemed ownership of the ship concerned that attaches to a charterer of the vessel and accepting that the point sought to be made is that the aim of the associated ship jurisdiction is to make available for arrest a vessel owned or controlled by a person who is personally liable for the claim or who controls the company that is liable for the claim, it is difficult to see on what basis one can ignore the case of a maritime lien. After all an associated ship can be arrested in respect of a claim giving rise to a maritime lien and the same question will arise in that situation, namely when did the maritime lien arise and who owned the ship concerned or controlled the company that owned it at that

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<sup>129</sup> Para [16] of the judgment.

time. The notion following from this that one is concerned not with the ‘offending ship’ but with the ‘offending owner’ creates similar problems to those that have arisen in England as a result of the judgment in the *Indian Grace*<sup>130</sup> where the approach of ignoring the maritime lien was adopted. In addition it introduces a novel concept of the ‘offending ship’ not previously encountered in the jurisprudence on this topic, save in the dramatic language of Lord Denning in *The Banco*, which was not directed at indicating that in actions *in rem* it was the owner rather than the ship that is liable. Historically the vessel in respect of which the claim arises is referred to as ‘the ship concerned’, which is appropriate as there may be no wrongdoing by the ship concerned in relation to the claim. The use of the pejorative expression becomes a rhetorical device to transit from the notion of the ‘offending ship’ to the notion of an ‘offending owner’ and thence to the notion of ‘offence’ which is equated to breach. This is a play on words rather than a process of legal reasoning. There seems to be no appreciation that it is a view that has profound implications for the understanding of the nature of the action *in rem* itself as will emerge from the discussion in the final chapter of this work.

But even if one does accept that this concept has some validity and that in the vast majority of cases one is dealing with a claim for which the owner of the ship concerned is liable that does not resolve the question of when the claim against that owner arose. If one speaks of an offending owner one can only do so in the context of a claim against that owner. The law is not concerned with making moral judgments about the conduct of shipowners. It is concerned with the more prosaic question of their legal liability for claims. It is only when their offending conduct, such as a breach of contract or delict, has caused damage, and hence that the party injured thereby has suffered damages, that the law intervenes to remedy the offence. And that is what the particular provision under consideration does. It is not concerned with the offending owner but with the claim and when that claim arises. If it arose at a time when A was the owner of the ship concerned and that renders vessels owned or controlled by A liable to be arrested as associated ships that fact is of no assistance in answering the question of when the claim arose. An owner

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<sup>130</sup> *Republic of India v India Steamship Company Limited (Indian Grace)*(No. 2) [1998] 1 Lloyd’s Rep 1 (HL). Also reported as *The Indian Endurance* (No. 2), *Republic of India and another v India Steamship Company Limited*

may 'offend' in the sense that the judge used that expression but no claim may ever arise. For example the other party may undertake an inspection of the vessel, note the defect and demand that it be remedied. A surveyor from the classification society may come on board to certify some routine matter and in the course of their duties become aware of something that leads the classification society to impose a condition on class, that the 'offending' seller then has to remedy. The purchaser's master and crew may come on board for an orientation and detect that something is amiss with the vessel. All of this may well occur after delivery is tendered. In those events there is no claim and it is difficult to see on what basis one can speak of a claim having arisen.

This last point highlights the central problem with the approach adopted by the court in the *Cape Courage* namely that intervening events may ensure that there is never an exigible claim at all. In all of the examples mentioned above the problem will be resolved before loss is suffered. It is of little help to say that the claim has arisen and then gone away. The section does not contemplate the magician's mantra: 'Now you see it. Now you don't.' There is no comparable situation where a claim may exist one minute and cease to exist the next. Let me take one more example arising from experience in a case where an oil drill rig slipped its moorings in Cape Town harbour and caused severe damage to a number of vessels as it caroomed around the harbour in high winds. What happens if the vessel that is the subject of the sale is sunk in a storm or as a result of a collision after the tender of delivery? Clearly the prior failures that might have matured into claims had delivery been effected and the purchaser realised that there had been breaches of the MOA would never in fact become claims. The consequence of the vessel being lost would depend upon the incidence of the risk and the terms of the MOA. Yet in terms of this judgment maritime claims for damages for the breach of the MOA have arisen prior to the loss and are quantifiable only on the basis of delivery occurring. The question must then be asked what happens to these claims. Clearly they cannot be pursued yet in terms of the judgment they would form the proper foundation for the arrest of an associated ship. That cannot be correct, yet it is the clear consequence of the judgment.

The only purpose of identifying that a claim against the ship concerned has arisen is to enable the claimant to arrest an associated ship, yet in the situation under consideration by the court no such arrest would have been possible until after the transfer of ownership of the ship concerned to the purchaser which is the time when a claim would have come into existence. That is not a result contemplated by the section. The inability to arrest would arise because the claimant would not yet have suffered any damage or any loss. An argument that such damage was overwhelmingly probable or indeed certain was considered and rejected by Beldam LJ in relation to an attempt to obtain a *Mareva* injunction in *The Vera Cruz I* and similar arguments have consistently failed in the United Kingdom<sup>131</sup>. The contention in those cases that once delivery was effected the existence of a claim was certain did not affect matters. Regrettably the SCA did not grapple with these authorities or any of the others to which it was referred in the course of argument.

The end result is the conclusion expressed in the following passage, which bears repeating because it highlights the vagueness and uncertainty occasioned by the decision and the absence of an underlying principle in it. It is the statement that:

*'It accordingly makes sense, when a claim has 'originated' and enough factors are present to indicate that the owner or controller of the ship concerned at that time (or those for whose actions or omissions it is liable) has 'offended', that another ship owned or controlled by that person when the claim is enforced may be arrested in respect of the claim. Damage resulting from the offending actions or omissions by the owner or controller (or for which it is liable) may not yet have been suffered but if it is clear that it will in due course be suffered, I think that it is not stretching language to say that the claim has 'arisen'. (Emphasis added.)*

Clearly damage had not yet been suffered and there was no prospect that it would be suffered until delivery was accepted and ownership passed so one is left with the concept of a claim arising before damage is suffered on the basis that a claim that does not exist has 'originated' and

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<sup>131</sup> *The Veracruz I* [1992] 1 Lloyd's Rep 353 (CA) 357-359. See also *Ninemia Corporation v Trave Schiffahrtsgesellschaft m.b.H und Co K G (The Niedersachsen)* [1983] 2 Lloyd's Rep 600 (CA) and *The P* [1992] 1 Lloyd's Rep 470 [QB (Com Ct)].

that there are ‘enough factors’ to show that its owner or controller has ‘offended’. This is taken together with the court’s view, arrived at with the benefit of hindsight, that damage will be suffered. Respect and restraint require that one confine oneself to saying that this is a remarkably amorphous concept of a claim arising. It raises more questions than it answers. Three points are sufficient to identify the major problems it occasions. Firstly, as already discussed, it is not possible to determine when or on what basis a claim can be said to have originated. Secondly it is impossible to tell what factors are relevant to knowing when the owner (and here for the first time and without prior discussion the court introduces the notion of other persons for whom the owner is liable without saying if that includes cases of maritime liens) has ‘offended’. Thirdly it is impossible for anyone standing at the point of breach to say with confidence that damage will be suffered as opposed to predicting that it will probably be suffered. The court then refers ‘as a matter of interest’ to an Australian case that has no bearing on the issue<sup>132</sup> but coincidentally uses a similar expression because it happens to be the words of the section of the Australian legislation under which the issue in that case arose. It is plainly irrelevant and unhelpful.

With respect the judgment lacks any persuasive basis in established legal principle. It can only be explained on the basis that the court took a policy decision that it was wrong or unfair for the purchaser in that situation to fall outside the category of persons entitled to invoke the associated ship jurisdiction<sup>133</sup>. Although the judgment covers all cases where some of the events

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<sup>132</sup> *Laemthong International Lines Co Ltd v BPS Shipping Limited* (1997) 190 CLR 181 (H C of A). The case dealt with the question of the meaning of the word ‘charterer’ in s19 of the Admiralty Act 1988 (Cth). It had nothing to do with the meaning of the expression ‘when the cause of action arose’ in the same section and in using it in the cited judgment their Honours were merely repeating the words of the section. The argument before the court was that a voyage charterer did not fall within the meaning of ‘charterer’ and this argument was rejected. The significance attached to the fact that their Honours referred to a claim arising when a breach occurred and before damage was suffered needs to be seen in the light of the fact that under the common law a breach of contract gives rise to an entitlement to claim nominal damages so that the claim is said to arise when the breach occurs. It is by no means clear that either an English or Australian court confronted with statutory wording in the context of a provision similar to section 3(7) would hold that the claim arose before damage was suffered. The cases concerning *Mareva* injunctions suggest otherwise. All that this does is highlight the importance of context before engaging in borrowing from other jurisdictions.

<sup>133</sup> If that is correct it did so without articulating that policy thereby ignoring Lord Steyn’s caution that ‘judges ought to strive to give the real reasons for their decision’. *McFarlane v Tayside Health Board* [1999] 4All ER 961 (HL) 977j

giving rise to a claim have occurred before the claim comes into existence and the ownership of the ship concerned changes before the claim has fully come into existence the situation is a special one. It is most likely to arise in the situation where a maritime claim arises out of an agreement for the sale of a vessel where the purchaser is disappointed in the quality of goods delivered and seeks a remedy. As the purchaser is now the owner of the ship concerned its prospects of obtaining redress are likely to be small if the vessel was previously owned by a one-ship company. Hence the wish to invoke the associated ship jurisdiction. However the judgment also covers other situations in which there may be a change in ownership of a vessel while a claim is in the process of coming to full fruition. Repossession of a vessel sold on terms because of failure to comply with those terms; the collapse of a shipping group or a need to realise cash rapidly resulting in a 'fire sale' of a vessel in the course of a voyage, or the abandonment of a vessel to its underwriters after a maritime incident all provide possible instances where the judgment could be relevant. Against this background of the potential scope of application of the decision the difficulty is to identify the reasons of policy that moved the court to its conclusion. All that one can perceive is an undercurrent of sympathy for the situation of the purchaser in the key highlighted passage from the judgment<sup>134</sup>. However sympathy is hardly a proper basis for the interpretation of legislation and no reasons are given for affording such sympathy to purchasers of ships who are presumably capable of protecting their own interests by customary commercial means if they think it necessary to do so. Every consideration of principle pointed to the opposite conclusion and there are dangers in a court departing from principle in order to facilitate a result that it thinks will be fair to a particular litigant. Ours is not the only jurisdiction that has noted that hard cases make bad law and it is in any event not clear why the claim of the purchaser of a ship is a hard case worthy of special consideration.

Accepting that a policy perspective underpinned the judgment there are other policy considerations that should have been borne in mind. An unconvincing judgment based on unarticulated reasons of policy or sympathy for one type of litigant may attract the charge that

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<sup>134</sup> The court also faced the predicament that if it dismissed the appeal that would have demonstrated that the result of the *Heavy Metal* was wrong.

South African courts are minded to exercise a broad jurisdiction in these matters to the advantage of South African lawyers<sup>135</sup>. In particular when taken together with the decision in the *Heavy Metal* and the continued articulation of the purpose of the jurisdiction as being directed at parties who have sought to avoid the sister ship jurisdiction of the Arrest Convention it gives the impression that our courts are hostile to the legitimate interests of shipowners. Unconvincing judgments on maritime issues from our highest court<sup>136</sup> will make parties less willing to have resort to South African courts for the resolution of their disputes to the detriment of our legal system as a whole. Then when judgments are couched in the type of vague words of this decision<sup>137</sup> it produces uncertainty and confusion all of which is undesirable particularly in a commercial context. Lastly all of these considerations may redound to this country's detriment if as a result other jurisdictions become reluctant to accept and enforce the judgments of our courts<sup>138</sup>. In international matters of which shipping cases form part that would be a very serious situation. Overall there can be little doubt that the judgment is wrong in principle and most unfortunate for our admiralty jurisdiction.

(i) **Practical implications of the need to identify when the claim arose**

It is submitted that there is a practical lesson from the general discussion of this topic even though it has to some extent been thrown into disarray and confusion by the judgment in the

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<sup>135</sup> This is not mere speculation on my part. It has been reported to me that precisely that suggestion was made at a recent meeting of London maritime lawyers about the likely stance of the South African government to complaints about the associated ship jurisdiction, the suggestion being that the response to a complaint would be that it is a nice little fee-earner for South African lawyers and a positive enhancement of South Africa's balance of payments.

<sup>136</sup> It is the highest court in matters other than constitutional matters.

<sup>137</sup> The judgment uses 'originated' and 'offended' placing both expressions in inverted commas and says that in order to determine whether an owner has 'offended' one looks to see if 'enough factors' of an unspecified kind are present.

<sup>138</sup> Both South African courts (*Jones v Krok* 1996 (1) SA 504 (T)) and English courts (*Adams v Cape Industries plc* [1991] 1 All ER 929 (Ch D and CA)) have jibbed at the notion that they should enforce penal damages awards issued by United States courts. When the Act was drafted one of the concerns that underlay the retention of the action *in rem* was the view that jurisdiction obtained by attachment *ad fundandam et confirmandam jurisdictionem* might not be recognised by foreign courts. An excessive claim to jurisdiction on the basis of the associated ship arrest raises the possibility of foreign courts not accepting judgments flowing from such jurisdiction or setting aside security obtained by means of such arrests. That would imperil the entire jurisdiction.

*Cape Courage*. Accepting that some claims may as a result of that decision arise earlier it is still necessary to identify the nature and basis for the claim being advanced before one can determine when that claim arose. It is now clear that a claim will certainly have arisen by no later than the time when it came into existence and not when it becomes due and payable. However a claim does not come into existence (arise) in South African law merely because there has been a breach of contract or an act of negligence. If the claim is one to recover damages then such claim only comes into existence when damage is suffered. There may be an immediate right to enforce or cancel the contract but that is not the same claim.<sup>139</sup> The claim that is being advanced by the claimant must be identified in order to determine when that particular claim arose. In other words the question that must be posed in each instance is when the particular maritime claim relied on by the claimant arose. The importance of this becomes apparent where the arrest is a security arrest in terms of section 5(3) of the Act. In terms of that section such an arrest is permitted 'for the purpose of providing security for a claim'. The right to security is therefore expressly linked to a particular claim. However the position may well be that there are claims in respect of which there is an entitlement to security and other claims in respect of which there is no such entitlement. This may not emerge until a late stage as it is not a requirement for a security arrest that the arbitration or other proceedings should have commenced and the position may well be that no statement of claim or points of claim has been delivered in those proceedings at the stage that a security arrest is sought. Indeed the proceedings might not even have commenced as the claimant may take the practical point of view that unless it can obtain security it will not pursue such proceedings.

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<sup>139</sup> As to when claims arising from the same facts are the same or separate it will be helpful to have regard to cases arising from attempts to amend pleadings where the amendment is opposed on the basis that it seeks to introduce a new claim that has prescribed. There is a considerable body of authority on this question. See for example *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A); *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A); *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA); *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA); *Firststrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA).



The practical difficulty is that once security has been furnished the South African court will ordinarily have little further interest in those proceedings<sup>140</sup>. In those circumstances the claims formulated by the claimant may diverge substantially from the claims formulated in the application for security. Not all of such claims will be claims in respect of which it was entitled to security. Thus a claim for damages for breach of contractual obligations will ordinarily only arise when delivery takes place and if ownership passes simultaneously with delivery no associated ship arrest will be possible in respect of that claim. However a claim based on a prior misrepresentation at the time of concluding the contract may arise prior to delivery and the change of ownership. In those circumstances the claimant will be entitled to arrest the associated ship on the one claim but not the other. If the arrest is a security arrest the claimant will be entitled to security for the one claim but not the other. Courts and litigants must be alive to this and ensure that orders to provide security and the security itself are restricted to those claims in respect of which the claimant is entitled to such security. Otherwise the situation may arise that

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<sup>140</sup> Notwithstanding the decision by the Supreme Court of Appeal in *MV Alam Tenggiri Golden Seabird Maritime Inc and another v Alam Tenggiri SDN BHD and another* 2001 (4) SA 1329 (SCA) para 15 that once security has been furnished there is still a deemed arrest in terms of section 3(10)(a)(i) of the Act.

the claimant obtains security on one basis but pursues its claim in the relevant proceedings - usually in a foreign arbitration - on an entirely different basis.<sup>141</sup> That is an abuse that the courts must be alert to prevent<sup>142</sup>

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<sup>141</sup> Comrie J noted that this is precisely what happened in the London arbitration involving the *Heavy Metal*. See *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 2000 (1) SA 286 (C) 293B. There the claim for security was based on a breach of clause 11 of the MOA but when the points of claim were served they included claims based on misrepresentation and implied terms. These were not the claims in respect of which security had been obtained and it is unclear whether they were claims in respect of which the claimant was entitled to security. In a case in which the writer was involved the claims advanced in the points of claim in the arbitration were all claims that it is accepted did not arise until ownership passed with delivery of the vessel. However in the affidavit in support of the application entirely different claims were advanced to overcome the problem in obtaining security. No attempt was made to amend the points of claim.

<sup>142</sup> It is what happened in fact in *The Cape Courage* where the claimant sought to introduce an entirely different claim for the purposes of sustaining the arrest which it never sought to introduce as a claim in the arbitration.

## CHAPTER 7

### THE CONCEPT OF CONTROL

#### 1 INTRODUCTION

Most ships, or at least those that give rise to maritime litigation, are owned by companies in the conventional sense of organisations incorporated by law, having an existence separate from the natural persons who stand behind them and enjoying the benefits of limited liability. Within that broad description there are myriad forms that a company can take depending upon the terms of the domestic legislation under which it is incorporated. In general, however, those local variations are unlikely to be relevant to the question of whether a ship is an associated ship for the purposes of the Act. Other forms of corporate body are recognised by different legal systems and the Act in turn recognises this fact by including any form of juristic person within the concept of a company.<sup>1</sup>

The principal focus of the associated ship arrest was always intended to be the operation of shipping fleets under the same beneficial ownership but with the vessels forming part of the fleet in the ownership of separate ‘one-ship’ companies. That conceptual model underpinned the notion of association. As the concern lay with identifying the person or persons who ultimately benefited from the ownership of the vessels and their operations<sup>2</sup>, whatever structures may have been interposed between them and the vessels themselves, it was insufficient to base the concept of association on ownership alone. Whilst ownership was recognised as a basis for association the broader concept of control provides the principal focus of the associated ship jurisdiction in

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<sup>1</sup> Section 3(7)(b)(iii). The section also includes any body of persons, which would presumably include a partnership or joint venture and perhaps some bodies such as trusts.

<sup>2</sup> This person if an individual is usually referred to as the beneficial owner of the vessel. That expression neatly encapsulates the notion of the person who enjoys the benefits of ownership. It is in this sense that the expression is used in this chapter.

practice. As the Act does not define what is meant by control, that expression is given meaning by the courts in the varying factual circumstances that come before them.

It is convenient at the outset to approach the requirements of the Act in regard to the control of companies by considering the conventional situation of a company having the features described above. As these are what are generally understood to be the characteristics of a company and this is the type of organisation most frequently encountered in practice confining the discussion to that case is not unduly limiting. This concept of a company permeates the statements by judges in regard to the nature of the requirement of control because in general they have been confronted with this type of entity. However, in view of the extended meaning given to the notion of a company by way of the definition in s3(7)(b)(iii) of the Act as including ‘any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares’, it may well be that the concept of control cannot be confined to control as exercised in relation to conventional companies. Be that as it may until such a situation arises in practice this may be a rather academic consideration. For the present therefore the discussion can be confined to companies in the conventional sense. In order to avoid repetition the focus will fall on the situation where both vessels - the ship concerned and the putative associated ship - are owned by companies in the conventional sense, that is, not in the extended sense given by section 3(7)(b)(iii). What is said in that regard is equally applicable to the situation where one of the vessels is owned by a natural person and the other by a company.

## 2 **THE STATUTORY PROVISIONS**

As the reference to control appears in a statute the meaning to be attributed to it falls to be identified by a conventional process of statutory interpretation. The best starting point is therefore the statutory language. That enables one to identify the conclusions that flow from it and to consider those in the light of any relevant extraneous material.<sup>3</sup>

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<sup>3</sup> As Harms JA said in *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse* 1997 (4) SA 613 (SCA) 632G - H:

(a) **A single controlling interest**

Sections 3(7)(a)(ii) and (iii) contain three references to the control of a company in similar but not identical terms. Thus both subsections refer to ‘a person who controlled the company which owned the ship concerned’ and sub-section (iii) refers, in relation to the associated ship, to ‘a company which is controlled by a person’. It is not suggested that these slight shifts of language, dictated as they are by the grammatical structure of the provisions in question and their differences in tense, convey any difference of meaning. They do convey, and on the face of it quite unequivocally, that in applying these provisions the search is for a single *locus* of control. This follows from the clear language of the sections. They are couched in the singular and refer to ‘control’ of the company. They do not as a matter of language contemplate that an investigation into the question of control could identify more than one controller.

Nor does the language suggest that the position can be any different as a result of control having more than one meaning for the purposes of the section. In other words these sections do not contemplate the possibility that because control may take more than one form, either direct or indirect, there may be more than one person controlling a company depending upon the sense used. Had this been contemplated so that there might be more than one *locus* of control of the company, one would have expected to find a mechanism for distinguishing between the different sources or giving priority to one over another but there is none. All that the sections require is that in relation to both the ship concerned and the associated ship a ‘person’ must be identified

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‘Interpretation concerns the meaning of words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later’

In the recent case of *KPMG Chartered Accountants (SA) v Securefin Ltd and another* 2009 (4) SA 399 (SCA) the same learned judge said: ‘... to the extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’ (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances’. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms ‘context’ or ‘factual matrix’ ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2008 (6) SA 654 (SCA) para 7.)’

who ‘controls’ or ‘controlled’ the companies in question. The process of comparison that follows upon this identification is intended to be a simple one. The maritime claimant identifies the party who controls the company that owned the ship concerned and identifies the party who controls the company that owns the associated ship that it seeks to arrest. The result of those exercises is then compared. If they correspond, in the sense that the same person or persons control both companies, then the requisite association is established<sup>4</sup>. If they are not the same then the association is not established. The proper conclusion from the language of section 3(7)(a) is that the legislature was of the view that for each company it would be possible to identify a single person or persons who controlled that company at the statutorily relevant time.

(b) **Actual or ultimate control**

This understanding of the manner in which the sections are intended to operate does not clarify what is meant by control. All it does is establish that the enquiry is one directed at identifying the ‘person’ who controls the company in the sense that the statute regards as relevant. What kind of control that is the Act leaves for determination by way of a process of interpretation. In what sense then does the Act use the expression ‘control’? There seem to be several possibilities. The narrowest is the legal and formalistic control under the applicable law of the country where the company is incorporated which identifies the person who in accordance with the appropriate legal system is to be regarded as controlling the affairs of the company for the purposes of the law of that country. In other words one looks at immediate legal control of the company. Alternatively control may refer to the power to manage the operation of the vessel as a commercial venture. As we are concerned with companies that have only a single trading asset of any relevance, namely a ship, the management of the commercial activities of the vessel constitutes management of the day to day affairs of the company. Apart from these activities the company has no business so that control of the management of the vessel may be regarded as

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<sup>4</sup> This should not be understood as saying that it is essential to the proof of association that a specific natural person or persons must be identified as controlling the two companies. It will suffice if the chain of control in both instances leads back to a common source of control, even if the applicant is unable to identify that source. The source may itself be corporate. What is important is that it is common to both ship-owning companies.

control of the company itself. This may be referred to as managerial control although we will see that this expression is wide enough to encompass a variety of very different situations. Lastly and at its most general control may refer to actual or ultimate control of the company's activities, however exercised, and irrespective of the controller's economic stake in the company. This control is distinct from managerial control in that it has within itself the power to control the manager and direct what they do. It consists in a general oversight of the activities of the company and hence the vessel and the power to continue or alter or discontinue its activities, to lay up the vessel or to sell it. It is the ability to control and direct that is significant here not the actual day to day activities of the person in whom that power vests.

In examining these different possibilities it is convenient to start with the narrowest sense in which control can be used namely immediate legal control over the company in question by whatever mechanism is recognised as giving that control under the law of the company's incorporation. Thus in South Africa and many other countries whose company law has been derived from England the relevant legislation only affords specific recognition to the registered shareholder irrespective of the capacity in which that shareholder holds the shares and irrespective of any restraints operating on that shareholder in the exercise of his or her or its rights as a shareholder. Technically it is only the registered shareholder who can exercise the votes attaching to a share and by those means directs the affairs of the company. Hence the registered shareholder whose shares carry the majority vote will for legal purposes control the company. If they have acted in a particular way then that is the action of the company irrespective of whether in doing so they acted in accordance with instructions from another or whether they acted contrary to such instructions. In jurisdictions where bearer shares are recognised it will be the person who for the time being is in possession of the shares that have the greatest voting power. There are no doubt variations on this theme but it is unnecessary to explore them. The question is whether this is the meaning that the legislature had in mind in referring to control.

The problem with such an approach is that it invites circumvention and ignores commercial reality. Let us take two ships A and B owned by separate companies X and Y both of which have

Z as their sole shareholder. On this approach the vessels would be associated ships because X and Y would have the same shareholder and would be controlled by the same person. However that result could be avoided by the simple expedient of interposing between the shareholder Z and the companies X and Y, two further companies X1 and Y1. Commercially the position would be identical but on the narrow approach to the concept of control that would be the result. It seems improbable that the legislature had this in mind. In the Law Commission report that led to the enactment of the Act it had been suggested<sup>5</sup> that sister ship arrests under the Arrest Convention had been stultified by the move to 'one-ship' companies. There would have been little purpose served by moving beyond the sister ship arrest and creating a situation that could have been circumvented so easily. The improbability is reinforced by the provisions of section 3(7)(b)(ii) of the Act where reference is made to the power 'directly or indirectly' to control the company. Such language is pointless if the enquiry is confined to legal control irrespective of actual control. This possibility can be safely rejected as giving the sense in which control is used in the Act. That is not to say that regard will not be had to these matters. It is merely that they cannot of themselves give a complete answer to the question of who controls the company and the enquiry in regard to control cannot stop at this point.

The second possible form of control relates to the control that the managers of the business have over its affairs. The nature of this may vary widely. At one level those who manage may be merely employees and agents whose tasks are administrative and not ministerial. They are put in place by the shareholders in order to carry out the latter's directions and are readily replaced. They may have input into key decisions but ultimately no power to take such decisions. This may be so even if the agent has considerable latitude in regard to the operation of the vessel as is usually the case with a managing agent. As was pointed out by King AJ in an early case<sup>6</sup> there must be managing agents in different parts of the world who manage a number of vessels on

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<sup>5</sup> Correctly so, but the move to 'one-ship' companies was not directed at achieving this result for the reasons given in Chapter 4.

<sup>6</sup> *E E Sharp & Sons Ltd v MV Nefeli* 1984 (3) SA 325 (C) 327A. Whether there are as he said 'many' such agents is perhaps debatable.



behalf of different and unconnected owners. It could not have been intended that the employment of common managing agents on its own would give rise to an association rendering all the vessels under the same management liable to arrest as associated ships. This seems clearly to be correct but it cannot dispose of all instances of common management.

There are cases where the manager may effectively run a number of one-ship owning companies with little or no input from shareholders. (The managers may themselves be shareholders but only in respect of a minority interest.) Thus there are companies that act as professional ship managers for those who wish to invest in shipping but lack both the knowledge and the resources to do so on their own. In those cases the manager may identify vessels as suitable to be part of a fleet that it will manage and seek out investors to invest in each vessel, taking stakes of say between one and ten percent in the ship-owning companies, with no single investor or group of investors having any capacity to control any one-ship-owning company. Each company will have its own body of investors although there may be investors who invest in more than one of the ship-owning companies. However in the greater picture the only common feature holding the entire structure together is the manager. The terms of the investment effectively bind the investors to permit the management company to operate the vessel as part of its larger fleet and the only real remedy that a disgruntled shareholder has is to dispose of their investment, which the manager facilitates on their behalf. All decisions about the acquisition and operation of a vessel, whether its acquisition is financed and if so the terms and extent of that financing; the trades in which the different vessels in the fleet will operate and even when each vessel is disposed of are made by the managers. Meetings of shareholders are purely a formality. The only difference between this situation and one in which a variety of investors invest in a company, which in turn owns a number of one-ship-owning companies, is that the individual investor has a stake in a particular vessel and not the general interest that a shareholder would have in the latter type of company in all the vessels in the fleet. Managerial control encompasses this situation. There seems to be much to be said for the proposition that in a circumstance such as this it is a power to control the assets and destinies of each of the ship-owning companies, particularly when it is recognised that this is a power that can be exercised indirectly. Otherwise one is left with the peculiar proposition that no-one controls the ship-owning companies, a

proposition that appears to fly in the face of reality.<sup>7</sup> The Act proceeds on the basis that ship-owning and operating companies are controlled by some person or persons because otherwise they would not own and operate the ship that is the principal asset of the company, and it is this control that is important for the purposes of the associated ship provisions. However this is an extreme and somewhat unusual situation. It should not be taken as indicating that in the ordinary course common management of ship-owning companies suffices to establish an association between them. If there is an association here it flows from the nature of the control exercised by the managers over the ship-owning company.<sup>8</sup>

Neither legal control nor limited managerial control seems to be sufficient to support the arrest of a ship as an associated ship. That points towards the conclusion that it is overall or ultimate control of the affairs of the ship-owning company that is intended. This conclusion derives support from the accepted purpose of permitting an action *in rem* to commence by way of the arrest of an associated ship as it emerges from the language of the statutory provisions<sup>9</sup>. That purpose is to make the loss fall where it belongs by reason of common ownership of the two vessels or by reason of common control of the companies that own the two vessels.<sup>10</sup> In other

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<sup>7</sup> In a case in which the writer was engaged where the corporate structure was largely as set out in this example it was contended by the ship-owning company that no-one controlled the company, which seems self-evidently absurd as the company was a profitable trading entity. However see the judgment in *MV La Pampa Louis Dreyfus Armateurs SNC v Tor Shipping* 2006 (3) SA 441 (D), para 53-55.

<sup>8</sup> On the other hand to treat the vessels as associated ships in this situation does seem to undermine the principle that one is trying to lay the responsibility for the debt on those who by virtue of their ownership interest in the associated ship should properly bear that burden. In the case described above an association would render shareholders in a one-ship company, A, liable for the debts of another one-ship company, B even though their shareholdings may overlap only to a minor extent. That is inconsistent with the grounds of justification of the associated ship jurisdiction.

<sup>9</sup> This follows the basic rule of interpretation that one ascertains the intention of the legislature by having regard to the language used in the provision in the light of its scope and purpose. *Nkisimane and others v Santam Insurance Company Ltd* 1978 (2) SA 430 (A) 434A. How this is labelled hardly matters. As Harms JA said: 'If one has to label this method of interpretation, it can either be an application of the 'soewereine' rule of interpretation of Dr L C Steyn, namely, a determination of the intention of the Legislature, or the 'purposive construction' of Lord Diplock, or even Lord Steyn's 'context is everything'.' *A Moolla Group Ltd and others v The Gap Inc and others* 2005 (6) SA 568 (SCA), para 17.

<sup>10</sup> *Euromarine International of Mauren v The Ship 'Berg'* 1086 (2) SA 700 (A) 712A-B. That case was decided before the amendments and I have accordingly adapted what was there said to the present situation. It is convenient

words where the beneficial ownership of the two vessels is the same so that they operate as part of a broader enterprise it is appropriate for the vessels to be regarded as associated and each to be subject to arrest for the debts of the other. In that way the ultimate loss falls on the same person or persons. This can only be achieved if the section is concerned with real or actual control over the company. Any other approach is destructive of the fundamental rationale for the institution of the associated ship. As explained in Chapter 4, whilst the use of one-ship companies is a legitimate form of corporate organisation for which there may be many different justifications, to the extent that it shields the assets of the beneficial shareholder from legitimate creditors of one or other ship-owning company, it is proper for the legislature on grounds of policy to regard such use as exorbitant and provide the means for circumventing it. The provisions in respect of associated ship arrests are directed at achieving this. In order to achieve that purpose it is therefore necessary that there be a proper identity between those who control the company that owns the ship concerned and those who control the company that owns the associated ship. If that identity does not exist there is no justification at all for permitting an associated ship arrest. In that case the legislation would be imposing the debts of one company on another company without any adequate link between them. Such an approach is arbitrary and penal.

In many instances actual control, however indirect, of the ship-owning companies will also reflect the underlying economic interest in the vessels. In other words the fact of control will go hand in hand with at least a majority economic interest in the ship-owning companies. However this will not always be the case. We are familiar with the fact that in the commercial world it is feasible to establish business structures that secure to one party control of the enterprise whilst dispersing the economic interest in the enterprise among a number of parties. The obvious example is a simple pyramid structure in terms of which company A, in which X owns a 51 percent stake, owns 51 percent of company B, which in turn owns 51 percent in company C. X will control all three companies by virtue of his or her 51 percent interest in A, but X will only have an economic interest in B of about 25 percent and in C of about 12,5 percent. Similar

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to describe such common ownership or common control by the expression 'beneficial ownership' provided it is remembered that this does not mean that all the economic benefits of ownership accrue to the party exercising control.

structures may be established in the shipping industry to accommodate family members or business associates without imperilling the control exercised by the founder or controller of the business. The example mentioned above of the ship manager assembling and operating a fleet of vessels with a range of investors taking a share in different ship-owning companies is equally one where the manager's control of all companies in the group is not reflected directly in the manager having a majority economic interest in any of the ship-owning companies. There may therefore be instances where control of a company may not reflect a majority economic interest in that company.

It is submitted that this does not detract from the principle that the legislation is concerned with identifying the person or persons who exercise actual control over the two vessels at the critical times. If anything the reference to indirect control reinforces the possibility that this type of situation is also intended to fall within the concept of control. The circumstances where it will arise are likely to be infrequent and the alternatives create even greater anomalies where there may be no real connection between the trading activities of the two vessels and the owner of the associated ship is truly a stranger to the activities of the owner of the ship concerned. At least where one is concerned with actual control there is a common benefit accruing from the operation of the fleet in lowering operational costs and securing preferential rates for necessary items such as insurance, P & I cover, stores and agency services irrespective of whether any person or group of persons has a controlling economic interest in the two companies. A mechanism is also likely to be present to secure an internal adjustment among investors that attaches liability for the debt to those who should in fact bear the loss. Whilst therefore this situation involves some departure from the principle that association imposes the ultimate loss on the party for whose benefit the debt was incurred or in whose interests the ship concerned was being operated when it occasioned the loss, it is submitted that it is not sufficient of an anomaly to warrant a departure from the plain language of the provisions of the statute.

(c) **Conclusion on the requirements of control**

It is submitted that a proper interpretation of the provisions of section 3(7)(a) in the context of the Act as a whole and in the light of the purpose of the associated ship arrest is that they are

concerned with a single repository of control located in the person who exercises actual control, initially of the shares in the ship owning companies and, after the 1992 amendments, of the companies themselves. On that footing the issue of control would be determined from case to case as a largely factual matter. In most instances this will involve an analysis of the corporate structure of the groups of companies standing behind the ship owning companies.

This conclusion was undoubtedly the received wisdom amongst maritime lawyers for the first fifteen years after the Act came into force. The position was summarised as follows by Booysen J<sup>11</sup>:-

‘The level of control required is that the person must control the overall destiny of the company and not merely control the running of the company’s day to day affairs (*E E Sharp and Sons Limited v MV Nefeli* 1984 (3) SA 325 (C) at 326I-327C). Such a person has to be in effective control directly or indirectly of the affairs of the company (c/f *Secretary for Inland Revenue v Trust Bank of Africa Limited* 1975 (2) SA 652 (A) at 669F; *Secretary for Inland Revenue v Rile Investments (Pty) Limited* 1978 (3) SA 732 (A) at 737D) and really be the directing mind and will of the company. (c/f *Lennards Carrying Co Ltd v Asiatic Petroleum Co Limited* [1915] AC 705 at 713; *Tesco Supermarkets Limited v Natrass* [1971] 2 All ER 127 (HL) at 131h-j; *Commissioner for Inland Revenue v Malcomess Properties* 1991 (2) SA 27 (A) at 37A-H).’

This common understanding was, however, disturbed by the judgments, initially of the Cape High Court and then of the Supreme Court of Appeal, in the *Heavy Metal*.<sup>12</sup> Leaving aside for the present the question of when the maritime claim in that case arose<sup>13</sup> and assuming the correctness of the judgment on that point, there is much to be said for the proposition that on the facts of the case the claimant had proved an association by establishing that the real control behind the two

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<sup>11</sup> In giving the judgment of the Full Bench in *The Kadirga Five (No. 1) J A Chapman & Co Ltd v Kadirga Denizcilik ve Ticaret AS*, SCOSA C12, C14E-G.

<sup>12</sup> *MV Heavy Metal : Palm Base Maritime SDN BHD v Dahlia Maritime Limited and others* 1998 (4) SA 479 (C) and *MV Heavy Metal: Belfry Marine Limited v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA). For convenience these are hereafter referred to as the *Heavy Metal (Cape)* and *Heavy Metal (SCA)*.

<sup>13</sup> This is discussed in Chapter 6 *ante*, where the view is expressed that on a proper analysis of the nature of the claim in respect of which security was sought it did not arise until ownership of the ship concerned passed to the purchaser so that an essential element of an associated ship arrest was absent.

companies vested in the same person.<sup>14</sup> However, the majority, in a judgment by Smalberger JA, went far beyond the facts of the particular case. Based on the deeming provision in section 3(7)(b)(ii) they arrived at a conclusion that an association can exist between two ships even though the only connection between the two is that the separate individuals who exercise actual control over the two ship-owning companies and are the beneficial owners of the vessels chanced to use the same lawyer to incorporate the ship owning companies and act as their nominee on the share register of those companies. In so doing they departed from both the basic principles arrived at above on an analysis of the language of section 3(7)(a) of the Act. They concluded that the legislature accepted that there could be more than one person controlling the company at the same time and they also concluded that two different types of control could co-exist, namely legal control and actual control, vesting in different people simultaneously. That result is of such fundamental importance for the entire institution of the associated ship arrest and its implications so far reaching that the judgment of the majority demands critical scrutiny. If it is correct then we need to re-examine the analysis set out above to see where and why it is flawed. If it is incorrect then consideration must be given to ways in which to overcome the judgment and restore the *status quo ante*.

### 3 **The Heavy Metal**

#### (a) **The facts.**

On 23 October 1996, Dahlia Maritime sold the m.v. *Sea Sonnet* to Palm Base Maritime. In terms of the memorandum of agreement (MOA) the seller was obliged to deliver the vessel with present class free of recommendations and to notify the Classification Society of any matters coming to their knowledge prior to delivery which, upon being reported to the Classification Society, would lead to the withdrawal of the vessel's class or to the imposition of a recommendation relating to her class. Palm Base alleged that in a number of respects Dahlia had,

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<sup>14</sup> This was the basis upon which Marais JA dismissed the appeal and would in any event have been the basis upon which the majority would also have dismissed the appeal. See the *Heavy Metal (SCA)* per Smalberger JA, paras. 16-

between the date of conclusion of the MOA and the date of delivery, become aware of matters that would have led either to the withdrawal of the *Sea Sonnet's* class or to the imposition of a recommendation relating to her class, but had failed to notify the Classification Society accordingly. Arising from this Palm Base alleged that it had a maritime claim against Dahlia in respect of the m.v. *Sea Sonnet*.

Palm Base had accepted delivery of the *Sea Sonnet* and elected not to cancel the sale agreement. It alleged that it had suffered damages under various heads arising from Dahlia's breach of contract. It intended to institute arbitration proceedings in London in order to pursue that claim for damages. In order to obtain security for the proposed arbitration proceedings in London it sought the arrest of the m.v. *Heavy Metal* on the basis that the latter was an associated ship in relation to the *Sea Sonnet*. The owner of the *Heavy Metal*, Belfry Marine, challenged the arrest and sought to have it set aside on the basis that the *Heavy Metal* was not an associated ship in relation to the *Sea Sonnet*.

In seeking the arrest of the *Heavy Metal* Palm Base produced a body of evidence that showed that there were apparently close links between Dahlia Maritime and Belfry Marine. The two companies had the same registered office and the majority of shares in each company were registered in the name of Mr. Lemonaris, an advocate of the Supreme Court of Cyprus, practising in Nicosia. Mr. Lemonaris was the sole director of both Dahlia Maritime and Belfry Marine. In addition the two companies had the same secretary and the same company managed the two vessels as part of a fleet of vessels regarded as a group many of which had musically related names. According to the Greek Shipping Directory the operating address for the two vessels was the same as that of their managers. The managing director of the management company held a 10% shareholding in Belfry Marine. On a previous occasion when a vessel in the fleet had been arrested as an associated ship in relation to another vessel in the fleet, the managers had furnished security for its release. Publications circulating in the maritime industry identified the vessels as part of a fleet falling under common control.

The response to this evidential material was extremely limited. Mr. Lemonaris deposed to an initial affidavit in which he said nothing about the identity of the controlling interest in either Dahlia Maritime or Belfry Marine. He confined himself to the following:-

‘18. The shares I hold in the First and Third Respondents are held by me as the nominee for non-residents of Cyprus. It is normal practice in Cyprus for advocates to be appointed as nominee shareholders and directors. We act on the instructions of beneficial owners, which instructions are often given through intermediaries. We are required by the laws of Cyprus to abide strictly by, and carry out, these instructions and we are more often than not, as in the case of my relationship with the First and Third Respondents, simply ‘post boxes’.

19 I am therefore merely a nominee director and shareholder of the First and Third Respondents in which I have no interest or ownership. I exercise no control over these companies and, indeed, I have no discretion to represent these companies without having received instructions as I have, for example, for the purpose of dealing with this application.

20 Cypriot advocates are not, in terms of the ethical rules applicable, permitted to disclose information given to them in confidence by their clients. The information contained in the instructions given to me when I attended to the registration of the First and Third Respondents was given to me in confidence and I am accordingly not at large to disclose this information.’

These statements as to the role of Mr Lemonaris were hardly controversial bearing in mind that in the founding affidavit it had been said that:

‘To the best of the knowledge and belief of those instructing me, he is not directly involved in the business of owning or operating ships but serves as a ‘post box’ and registered office for the Brave Maritime group of companies, and possibly in other roles, such as the authorised signatory of the companies.’

On the evidence therefore it was common cause that Mr. Lemonaris had no beneficial interest in either company and was not in a position to take any decisions in regard to either of them without instructions from those on whose behalf he acted as nominee. His statement of his legal obligations as an advocate was also not challenged.

A significant feature of the response was that, save for denying that a minority shareholder in Belfry Marine controlled Dahlia Maritime, there was no attempt initially by Mr. Lemonaris to identify who did control the companies. In the face of a very considerable body of evidence that



indicated that the same person controlled two companies this provoked adverse comment from Palm Base. That criticism lead to him delivering a further affidavit in which he dealt with the shareholding in Dahlia Maritime from the date of signature of the MOA to the date of delivery of the *Sea Sonnet* in terms of that agreement and revealed that the ultimate beneficial owner of the *Sea Sonnet* was a Mr. Tsavliras. However, in regard to the m.v. *Heavy Metal* itself, he simply said that he was not authorised by the beneficial owner of that vessel to disclose their identity.

This produced a very curious state of affairs. The vessel under arrest was the *Heavy Metal*. That vessel was on its final journey to a breaking yard. Nonetheless the true beneficial owner of that vessel was not identified nor was any reason advanced why the beneficial owner should not be identified.<sup>15</sup> The court was therefore faced with the situation that the real party before the court, namely Belfry Marine as the owner of the m.v. *Heavy Metal*, was not prepared to instruct its nominee to disclose to the court, even on terms that such disclosure would be confidential, the identity of the person holding the beneficial interest in Belfry Marine. However, the former owner of the *Sea Sonnet*, who had both disposed of that vessel and, according to the evidence, disposed of the various companies through which he held his beneficial interest in the *Sea Sonnet*, was willing to be identified but not to put up an affidavit.

In those circumstances there is considerable merit in the straightforward approach adopted by Marais JA in the SCA of holding that on the facts Palm Base had discharged the onus of proving the association. He said that the response was permeated by evasiveness, constituted by selective and limited denials where such was possible and by diversionary strategies or arguments where it was not. It is difficult to fault his conclusion that:-

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<sup>15</sup> It emerges from the judgment in m.v. *Heavy Metal: Belfry Marine Limited v Palm Base Maritime SDN BHD* 2000 (1) SA 286 (C) 306, that Mr. Tsavliras offered a personal guarantee to secure the release of the *Heavy Metal* from arrest. This does not appear to have been before the court in the application to set the arrest aside. If he had no interest in the *Heavy Metal* and there was no connection with the *Sea Sonnet*, there was no good reason for him to provide such security. With the benefit of this knowledge it appears probable that he did indeed control both companies.

‘I do not think that a litigant in motion proceedings who resorts to this kind of response in the face of a powerful circumstantial showing that, on the probabilities, whoever ultimately had the power to control the company which owned the guilty ship also has the power to control the company which owns the ship sought to be arrested as an associated ship can shelter behind the principles laid down in the case of *Plascon-Evans Paints Limited*.<sup>16</sup> In a few words, such an approach should not be regarded as giving rise to a genuine dispute of fact.’<sup>17</sup>

That was the approach that had been adopted in an earlier case, relied on by Palm Base in argument, where the beneficial owner of the associated ship had adopted a similarly coy approach to identifying themselves.<sup>18</sup> As the views of Marais JA were shared by the majority judges<sup>19</sup> it is also difficult to see why the appeal was not simply disposed of on that basis. However the majority decided to go further. The approach that they adopted to the law and the interpretation of certain provisions of the Act is what renders this decision controversial.

(b) **The role of the presumption in section 3(7)(b)(ii)**

It emerged clearly from the evidence in the *Heavy Metal* that in practical terms Mr. Lemonaris, a Cypriot advocate, had absolutely no control whatsoever over the affairs of either Dahlia Maritime or Belfry Marine. His own description of himself as a ‘post box’, which was shared by the Applicant, is only consistent with his having no freedom to exercise any powers at all in relation to the affairs of the companies or the operation of the ships, which constituted the only business of the companies. The conclusion by both the Cape court and the SCA that he controlled both companies is accordingly highly artificial. The foundation for it must be examined closely.

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<sup>16</sup> *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A).

<sup>17</sup> *Heavy Metal* (SCA), Marais JA, para. 21, 1115F-H.

<sup>18</sup> *Hasselbacher Papier Import and Export (Body Corporate) and Another v m.v. Stavroula* 1987 (1) SA 75 (C).

<sup>19</sup> *Heavy Metal* (SCA), Smalberger JA paras. 16-20, 1107I-1108G.

Both the Cape court and the majority in the SCA relied for this conclusion on the provisions of section 3(7)(b)(ii) of the Act. That section provides that for the purposes of the provisions that define when a vessel is an associated ship:-

‘A person shall be deemed to control a company if he has power, directly or indirectly to control the company.’

Both the Cape court and the majority in the SCA held that as Mr. Lemonaris was the registered owner of the majority of the shares in both Dahlia Maritime and Belfry Marine he had power directly to control those companies. Accordingly they held that the effect of the deeming provision was that he was deemed to control both companies and further that this deeming was irrebuttable. The result, so it was held, was that the *Heavy Metal* was an associated ship in relation to the *Sea Sonnet*.

In the SCA there were two judgments that strongly dissented from the view of the majority<sup>20</sup>. It is fair to say that the conclusion was also one that took the maritime community by surprise. The implication of the decision was that a vessel might be held to be an associated ship even though there was no connection between the beneficial ownership of the ship concerned and the beneficial ownership of the associated ship<sup>21</sup>. What then was the reasoning by which each court reached this conclusion?

(c) **The Heavy Metal (Cape)**

It is not easy to discern from the judgment precisely what arguments were advanced on behalf of Belfry Marine before Thring J at first instance. Thus the judgment deals with the facts concerning the identity of the shareholders in the two companies, Dahlia Maritime and Belfry

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<sup>20</sup> Those of Farlam JA and Marais JA.

<sup>21</sup> J Hare in *Shipping Law and Admiralty Jurisdiction in South Africa* 2<sup>nd</sup> Ed (2009) says (at 111) that the decision ‘struck fear in the hearts of many operators of one-ship companies’. This is noted with interest in the foreword by Farlam JA who dissented from the majority view.

Marine and draws attention to the fact that they had the same registered office address, the same majority shareholder and director in Mr. Lemonaris and the same secretary. The judge then said<sup>22</sup>:-

*‘Prima facie a strong case is made out on these facts that both companies are controlled or were, at the relevant times, controlled by the same person, Lemonaris. Alternatively, if they are or were not in fact controlled by him, he has or had power to control them at the relevant times and is accordingly deemed to have controlled them.:’*

With respect neither sentence stands up to careful scrutiny. Cyprus is well known as a country that promotes the off-shore registration of vessels and has many companies that register vessels there for various commercial reasons, including a friendly tax regime.<sup>23</sup> The shareholder and director in question was an advocate of the Supreme Court of Cyprus practising as such in Nicosia. It was overwhelmingly probable in those circumstances that Mr. Lemonaris was merely a nominee on behalf of the true owners of the shares in the ship owning companies and not himself the owner of the shares. It was accordingly highly improbable that he controlled the two companies in any practical sense. Practising lawyers do not often combine their profession with a sideline in the ownership and operation of trading vessels.<sup>24</sup> The fact that the two companies had the same registered office did not justify any inference at all. No doubt it was the address used by Mr. Lemonaris in the conduct of his practice. Countless companies around the world have their registered offices at the offices of their auditors, but this hardly indicates a link

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<sup>22</sup> At 489G-H

<sup>23</sup> Shipping companies registered in Cyprus do not pay any income tax at all. Coles, *Ship Registration Law and Practice*, para 10.22, 117. A shipping company will ordinarily be registered as a non-resident (commonly referred to as an off-shore company) with the Central Bank of Cyprus, which will require proof that its entire share capital is beneficially owned by non-resident shareholders. Coles, *id*, para 10.7, 111. The advantage of this is that the company is then free of exchange control in its business dealings. The use of nominee shareholders and directors provides anonymity.

<sup>24</sup> In my experience practising lawyers with a maritime bent are more interested in pleasure boats such as yachts, motor-boats and recreational fishing vessels.

between all the companies audited by the same firm.<sup>25</sup> In the absence of any suggestion that the secretary was anything other than an employee of Mr. Lemonaris no weight could be attached to the fact that she was the secretary of both companies. All of this was apparent without even having regard to the affidavits that confirmed that this was the position and without having any special knowledge of international maritime trade.

The factors relied on by Thring J did not, whether separately or cumulatively, indicate that there was any connection between the two companies other than Mr. Lemonaris, who was admittedly a nominee for others. Viewed from a broader perspective the existence of such nominee relationships is so prevalent in international shipping<sup>26</sup>, where the vast majority of vessels are in the registered ownership of one-ship companies, that it is unsafe to draw any inference from the fact that two companies have the same nominee as their nominee shareholder and director. In countries where such forms of registration are prevalent, such as Panama, Cyprus and Malta, there are a number of firms of lawyers who specialise in registering companies for ship owners and acting as the nominee shareholder and, very often, director of the company, where the true owners wish to retain their anonymity.<sup>27</sup> On their own, proof of facts such as these does not indicate the existence of a commercial link between the two companies much less that they are controlled by the same person or that such person is the lawyer acting as nominee for the beneficial owners.

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<sup>25</sup> All Liberian one-ship companies are required to be registered at 80 Broad Street, Monrovia, Liberia the address of the LISCR Trust Company. Ready, *ante*, para 15.7, 174. That is not an indication that the entire Liberian fleet consists of vessels that have some commercial link to one another.

<sup>26</sup> And so well-known.

<sup>27</sup> Even a fairly cursory examination of the websites of Cypriot advocates offering such services reveals that one of the major benefits held out to ship owners is that their anonymity will be preserved as the lawyer will be their nominee as shareholder and director of the company in question and there is no public disclosure of the identity of the beneficial shareholders. As one site puts it 'Confidentiality and anonymity of the beneficial owners is assured by disclosing their details only to the Central Bank of Cyprus.' In jurisdictions such as the Bahamas where there is no public disclosure of the identity of the registered shareholder and director the need to use nominees falls away.

Evidential material of this type is only of assistance where there is other evidence before the court to suggest common control of the ship owning companies. Usually that is provided by evidence that the vessels form part of a single fleet and are managed by the same managing agents and have other features that point to common control. These may be varied. It may be relevant that both vessels are part of a single fleet entry with their P&I club. It may be possible to show that there are cross-mortgages between the vessels or common guarantors. The fact that the manager has guaranteed the debts of both vessels is important as indicating a connection between the two. Sometimes there is evidence of the identity of the person standing behind the fleet in the form of interviews with trade papers. It is when that evidence is available that the use of the same lawyer in the same off-shore registry to register the ship owning companies and that this lawyer acts as the nominee of the true owners of the shares in those companies becomes relevant as evidence supporting the inference of common control.

In the *Heavy Metal* there was indeed evidence of that type as has been demonstrated earlier in this chapter. It was not inappropriate therefore for the Cape court to say that there was a strong *prima facie* case that the two ship owning companies were at the relevant time controlled by the same person. However, the court's approach did not deal with this other evidence and elevated the facts concerning the registration, shareholding and directorship in the ship owning companies to a strong case standing on their own that Mr. Lemonaris was the person who controlled the two companies. In that it erred.

The conclusion that these facts made out a strong *prima facie* case that Mr. Lemonaris controlled both companies at the relevant times was unjustified. The details of the companies did not support this proposition and the further evidence clearly pointed away from that being the case. That evidence showed that the vessel was operated from Piraeus and was listed in the Greek Shipping Directory. Its managers were based in Piraeus and it was part of a fleet managed by the same ship managers. When the beneficial owner of the shares in Dahlia Maritime was identified he was a Greek based in Piraeus. If, as appears to be the case, Thring J was expressing a view on the real or actual situation in regard to control of the two companies at the relevant times there was simply no justification for that view. Nothing in the evidence suggested that Mr Lemonaris

actually controlled either ship-owning company in the sense of being the person who controlled their direction and fate. If the judge had some other concept of control in mind he did not identify it.

The second sentence in the quoted passage is even more difficult to understand unless it is written in anticipation of the later finding in regard to the effect of section 3(7)(b)(ii). If the judge was wrong in thinking that there was a strong case that Mr. Lemonaris actually controlled the two companies, the absence of such a case could not justify a conclusion that he had power to control them. Put simply if the evidence on which the judge was relying did not justify the conclusion that Mr. Lemonaris in fact controlled the two companies at the relevant times it equally had no bearing on the question of whether he in fact had the power to control the two companies. The statement is only explicable in the light of the subsequent conclusion in regard to the requirements for control.

These conclusions by the court were followed by a consideration of the evidence of Mr. Lemonaris. However, that reduced the enquiry to a series of fragmented stages, rather than a consideration of the evidence as a whole. The court took certain pieces of evidence and concluded that they pointed towards a particular conclusion. Only then did it consider the evidence on behalf of Belfry Marine, which was directed at establishing the opposite proposition. It is with respect unhelpful to weigh evidence in this piecemeal fashion. It also creates the risk of fragmenting the onus of proof. The onus of proving an association on a balance of probabilities rests on the claimant. It is unhelpful to take some of the evidence and hold that this creates a strong *prime facie* case and then consider the evidence that controverts it. Had the evidence on which the court relied been considered in the light of the affidavit of Mr. Lemonaris, which demonstrated his nominee status and was undisputed, the court could hardly have come to the conclusion that there was any case, much less a strong *prima facie* case, that Mr. Lemonaris in fact controlled the two companies.

This is relevant because it appears from the judge's description of the contentions on behalf of Belfry Marine that those contentions were construed and understood by him in the light of the

correctness of his earlier findings, whether or not actually advanced on that basis. Thus he said that the contention was that the allegations by Mr. Lemonaris justified the conclusion that Dahlia Maritime and Belfry Marine 'are controlled, not by Lemonaris, but by the beneficial owners of the shares held by him, whoever they may be.' The argument is reflected as being that:-

'...the deeming provision of s3(7)(b)(ii) of the Act is not conclusive and that the Court is entitled and, indeed, bound to look behind the picture which is presented by the facts registered in the share registers and other public documents of the companies and to determine who actually controls them by having reference to the facts deposed to by Lemonaris.'<sup>28</sup>

It is unclear from this whether counsel accepted that the deeming provision applied or, in the light of the judge's belief that it applied, argued that it was rebuttable. Whichever is the case the fundamental flaw lies in the premise that it had been shown that the deeming provision applied. That provision could have no application unless and until it had been shown that Mr. Lemonaris had the power, either directly or indirectly, to control the two companies concerned at the relevant times. It was common cause on the evidence that in practical terms he did not have any such power. To apply the presumption it was necessary for the judge to adopt some conception of the power to control a company other than actual practical control and to take the view that this different concept was applicable in terms of the presumption. This brings into focus the concept of the power to control a company in the deeming provision.

The reasoning of Thring J that lead to his final conclusion appears in the following passages from his judgment:-

'The purpose of the Act, as was said in the *Berg* case, *supra*, at 712A-B is to make the loss fall where it belongs by reason of ownership and, in the case of a company, ownership or control of shares. It is common practice these days for vessels to be owned by so-called 'one-ship' companies. One vessel is owned by one company, whilst other vessels are owned by other one-ship companies in the same group of companies, all of which companies are controlled by the same person or persons. It was with the object of extending liability for maritime claims beyond the 'one-ship' company which owns the

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<sup>28</sup> *Heavy Metal (Cape)*, 590G-H.



vessel concerned in the claim that ss3(6) and 3(7) of the Act were enacted. It is against this background, it seems to me, that the deeming provision of s(7)(b)(ii) of the Act must be construed. In my view it was intended to assist a claimant who seeks to rely on the 'associated ships' provisions of the Act in order to recover money due to him from the owner of an associated ship. It is frequently difficult for a claimant in this position to establish and prove who the beneficial owners of the shares in a particular ship-owing company are, because they are concealed from him. Indeed, this is amply demonstrated in this very case. Accordingly, it seems to me, the Legislature came to the aid of such claimants by providing, in effect, in s3(7)(b)(ii) that the claimant need establish no more than that the person concerned has the power to control the company concerned, directly or indirectly. Whether or not he in fact exercises that power himself or whether it is exercised through him by others is immaterial. He is deemed to control the company, that is to say he is regarded as controlling the company, whether he does so in fact or not. In other words, this is a situation in which the Legislature sought to achieve finality as regards the identity of the person or persons who control such companies, even at the expense perhaps of artificiality. Had it not sought this result, it seems to me that the Legislature would not have used the very strong word 'deemed' in the subsection (Afrikaans text 'geag'): it would have used some less far-reaching expression such as 'presumed until the contrary is proved.'

Having referred to two cases on the use of the word 'deemed' and accepting the dictum that:-

'Generally speaking when you talk of a thing being deemed something you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, notwithstanding it is not that particular thing, nevertheless ... it is deemed to be that thing.'<sup>29</sup>

Thring J proceeded as follows:-

'If I am correct in holding this view the only question which needs to be considered is whether Lemonaris has or had at the relevant times power to control both the First and Third Respondents. He says nothing in any of his affidavits to indicate that in the law of Cyprus companies are controlled differently in any material respect from the manner in which they are controlled in our law. His statement in para. 19 of his first affidavit that 'I exercise no control over these companies' when read in its context means no more, to my mind, than that the manner in which he acts in relation to the First and Third Respondents is subject to direction by others. He does not say that under Cypriot law he has no power to control the companies. In the absence of evidence to the contrary it is presumed that foreign law is the same as ours, being the *lex fori* ...

In s440A of the Companies Act 61 of 1973 'control' is defined as:-

"...a holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, the specified percentage or more of the voting rights

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<sup>29</sup> *R v Norfolk County Council* 65 LT 222

at meetings of that company, irrespective of whether such holding or holdings confer *de facto* control.”

The ultimate control over a company’s affairs is exercised by its members in general meeting, although immediate and direct control may vest in its directors, but they are answerable to the company’s members in general meeting who may, of course, determine who the directors are to be. ... It is the policy of the law that a company should concern itself only with the registered owners of its shares. ... It follows that even if he holds the shares of the First and Third Respondents as a nominee for others, Lemonaris, as the registered shareholder has the power directly to control these companies by voting the majority of their shares in their shareholders’ meetings. This means that as the majority shareholder of both companies Lemonaris has overall control over them; he can exercise control over their assets and their destinies... Moreover, as their sole director, he is probably the only person with managerial powers in them. In my view it does not matter that other persons or entities, as beneficial owners of the shares held by Lemonaris, may be entitled by reason of arrangements made *inter se* to direct Lemonaris as to how he exercises his powers: the companies are obliged to give effect to his legitimate wishes as the registered holder of the majority of their shares and are therefore subject to his direct control.’

There appear to be four elements to this line of reasoning. Firstly the court looked at the deeming provision contained in section 3(7)(b)(ii) and held that it was intended to constitute an irrebuttable deeming. In other words, whatever the true factual situation might be, the deeming provision would override it. Secondly, it asked whether Mr. Lemonaris had power to control the two companies, either directly or indirectly. In doing so it construed the power to control the company directly as referring to the question of where under the law the legal power to control the company lay. In other words it asked who the appropriate legal system would identify as being the person legally entitled to exercise power over the company’s affairs. Thirdly, and following from this approach the court had regard to the South African Companies Act, 61 of 1973, and asked itself who would be the party legally entitled to control a company under that statute. The answer it gave to this question was that the registered majority shareholder had that power. Lastly, the court applied the presumption that in the absence of evidence to the contrary the law of a foreign state is presumed to be the same as South African law. Each of these propositions will be subject to analysis and scrutiny in due course. Before undertaking that task, however, it is necessary to examine the reasoning of the majority in the SCA, which upheld the decision of the Cape Court.

(d) **The Heavy Metal (SCA)**

The judgment of the majority in the SCA was delivered by Smalberger JA.<sup>30</sup> The approach adopted differed in some respects from that of Thring J in the court below although it arrived at the same conclusion. The starting point was the proposition that a person can control a company without controlling all the shares in the company and that control over a company can be exercised without a majority shareholding. This apparently uncontentious statement does, however, conceal certain relevant issues. Firstly, in what sense was Smalberger JA referring to ‘control’ of a company or of the share in a company? Presumably the reference to controlling the company without controlling the shares in the company is a reference to real or actual control of its affairs irrespective of shareholding. It is indeed perfectly possible to control a company without any shareholding in that company at all. The reference to controlling the shares in the company is more problematic. It seems to refer to something different from ownership of the shares, but whether the expression is intended to include a situation where the registered shareholder is purely a nominee for the true owner of the shares is not clear. In any event the statement was only relevant to the question whether someone other than Mr Lemonaris controlled the two companies in that case. It was after all common cause that Mr Lemonaris was the registered shareholder in respect of the majority of the shares in both companies.

Leaving this aside Smalberger JA went on to consider the concept of control used in the Act. His approach was that the deeming provision in section 3(7)(b)(iii) cast light upon the concept of control. He expressed himself as follows:-

‘The subsection elaborates upon and refines the concept of control by that person. Control is expressed in terms of power. If the person concerned has power, directly or indirectly to control the company, he/she shall be deemed (‘geag ... word’) to control the company. ‘Power’ is not circumscribed in the Act. It can be the power to manage the operations of the company or it can be the power to determine its direction and fate.

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<sup>30</sup> It was concurred in by Nienaber JA and Melunsky AJA.

Where these two functions happen to vest in different hands, it is the latter which, in my view, the Legislature had in mind when referring to ‘power’ and hence to ‘control’.<sup>31</sup>

This approach does not appear to differ significantly from that taken in a number of earlier judgments. Indeed in the first case to consider the question the conclusion had been that the reference to the power to control the company in the deeming provision:-

‘Relates to overall control, such as is exercisable for instance, by a majority shareholder or his nominee, of the assets and destiny of the company; it does not refer to its day to day management and administration.’<sup>32</sup>

From this point on Smalberger JA moved into more disputable terrain. The judgment continues as follows from the passage cited above:-

‘In South African legal terminology that means (essentially for the reasons given by the court *a quo* ... at 492C-F; see also s195(1) of the Companies Act 61 of 1973) the person who controls the shareholding in the company. Foreign law is a question of fact. If the appellant wished to make out a case that the law of the Republic of Cyprus differed significantly from the law of South Africa it should have adduced evidence to that effect. It did not do so. Consequently there is no reason to surmise that the applicable law in Cyprus differs materially from that of South Africa ...’

In this passage Smalberger JA endorsed three aspects of the approach of Thring J in the Cape court. Firstly, he endorsed his reliance on the provisions of the South African Companies Act. Secondly, he endorsed the proposition that in dealing with control of a company the court was only concerned with the registered shareholding of the company. Thirdly, he endorsed the invocation of the presumption that foreign law is the same as South African law. These aspects will require further attention.

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<sup>31</sup> The *Heavy Metal* (SCA), para. 8, p1105I-1106A.

<sup>32</sup> *E E Sharp & Sons Limited v m.v. ‘Nefeli’* 1984 (3) SA 325 (C) 326I-327A. The correctness of the statement is not affected by King AJ having overlooked the fact that section 3(7)(a) throughout referred to control of the shares of the company, whilst the deeming provision referred to the power to control the company. That conundrum subsequently led the then Appellate Division in *Dole Fresh Fruit International Limited v m.v. ‘Kapetan Leonidas’ and another* 1995 (3) SA 112 (A) at 119H to hold that the section should be construed as referring to control of the shares of the company and not control of the company itself.

Smalberger JA's reason for adopting this approach lay in the fact that the deeming provision referred to the power to control a company both directly and indirectly. As he expressed it in the following portion of his judgment:-

[9] The subsection clearly distinguishes between 'direct' and 'indirect' power. That distinction must be given a meaning. Indirect power can only refer to the person who *de facto* wields power through, and hence over, someone else. The latter can only be someone who wields direct power *vis-à-vis* the company and the outside world and who therefore, in the eyes of the law (i.e. *de jure*), controls the shareholding and thus determines the direction and fate of the company. On the facts of the present case Lemonaris is the person in that situation. Of course, the same person may in given circumstances exercise both *de facto* and *de jure* control.

[10] In my view, therefore, direct power refers to *de jure* authority over the company by the person who, according to the register of the company is entitled to control its destiny; and indirect power to the *de facto* position of the person who commands or exerts authority over the person who is recognised to possess *de jure* power (i.e. the beneficial 'owner' as opposed to the legal 'owner'). This extension of *de jure* power to *de facto* power is in line with the objective of the section; to prevent the true 'owner', by presenting a false picture to the outside world, from concealing his assets from attachment and execution by his creditors.

[11] From the above analysis it follows, in my view, that, if the person who has *de jure* power happens to control, at the relevant times for such control, both companies concerned (i.e. the company which owns the guilty ship and the company which owns the targeted ship), the statutory requirement of a *nexus* between the two companies will have been satisfied. This is the position in which Lemonaris found himself.

[12] On the other hand, if *de jure* control of the respective companies vests in different hands it would still be open to the applicant for arrest to establish that the same person was in *de facto* (i.e. indirectly) in control of both, thereby also supplying the required statutory *nexus* to satisfy the provisions of s3(7)(a) of the Act.

[13] The principal purpose of the Act is to assist the party applying for arrest rather than the party opposing it. While the section is designed, in the interests of an applicant, to cater for the situations referred to in paras. [11] and [12] above it is not, in my view, designed to cater for the converse situation where *de jure* control over both vessels (companies) vests in one person, but the owner of the targeted ship is able to show that such person is a mere puppet dancing at the string of two different masters. If the latter approach were to be the correct one, the distinction drawn by the Legislature between 'direct and indirect control' would fulfil no purpose. The only issue on that approach would be *de facto* control. If that had been the Legislature's intention it need only to have spoken of the 'power to control' in the section. Any approach which effectively negates a clear provision in an Act cannot be sound unless there are compelling reasons to the contrary. No such compelling reasons have been advanced in the judgment of my Colleague.

[14] It needs to be emphasised that the subsection does not speak merely of the 'power to control'. If it did, the decision in *Barclays Bank Limited v Inland Revenue Commissioners* [1961] AC 509 (HL) referred to by my Colleague may have been of greater relevance to its interpretation. There is much to be said for the view that where one speaks simply of a

‘power to control’ one is concerned with a single repository of power - the person who is in actual, overall control. But the power to control directly or indirectly envisages two possible repositories of power, one *de jure* and one *de facto*. Either form of control can be satisfied to bring the subsection into operation. If there can only be one repository of power in terms of the subsection it would follow that the person who has *de jure* control could be ignored once it has been established that someone else has *de facto* power. This would appear to be contrary to the clear wording of the subsection. By using the words ‘directly or indirectly’ the Legislature clearly intended to extend and not restrict the expression ‘power to control’ (c/f *Olley v Maasdorp and Another* 1948 (4) SA 657 (A) at 665FF and *Lipschitz N.O. v UDC Bank Limited* 1979 (1) SA 789 (A) at 797D-E.

[15] In my view, and on the undisputed facts, the respondent therefore succeeded in establishing the requisite *nexus* for the conclusion that the *Heavy Metal* was an associated ship of the *Sea Sonnet*. If that conclusion results in the bizarre position referred to in para [57] of my Colleague’s judgment, that is the direct and foreseeable consequence of a ship owner choosing to operate behind a cloak of secrecy. It is precisely for that reason, because the creditor is at such a disadvantage in tracing the assets of his debtor, of which this case is a prime example, that the subsection was worded as it is. The result is not as unfair as it may at first blush seem, for it lies within the power of the ship owner to arrange his affairs and his relationship with the company in question so as to avoid any prejudicial consequences to himself...’

It is clear from these portions of the judgment that the distinction drawn between direct and indirect control of the company was critical to the majority’s judgment. The categorisation of direct control as being *de jure* control, that is, formal legal control in accordance with South Africa’s company legislation, with all other forms of control being categorised as indirect or *de facto* control is also critical. Of course, once that distinction was drawn in that way the result was inevitable. However, the distinction is also central to other reasoning in the judgment as emerges from paragraph [13], where it is suggested that an approach that required the court to look at actual control, whether exercised through ownership of shares or indirectly through other means, would nullify the distinction between direct and indirect control and render it nugatory. That proposition will also be examined in much greater detail.

The last point to be made about this reasoning is that Smalberger JA and his colleagues who concurred in his judgment appeared unconcerned about the consequences of this decision<sup>33</sup>.

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<sup>33</sup> Bradfield, [2005] LCMLQ 234, 246 refers to the majority’s ‘rather dismissive attitude to the consequences of their decision’. I agree with him that the decision of the majority is incorrect but his suggestion that the reason is that the majority erred in treating the expression ‘directly or indirectly’ as adjectives qualifying ‘power’ rather than as

That they were aware of those consequences is apparent from a reference in Smalberger JA's judgment to an aspect of the dissenting judgment of Farlam AJA<sup>34</sup>. The argument summarised in that paragraph was that the interpretation of the majority led to the bizarre conclusion that merely because two companies had the same nominee shareholder and nominee director, but no real commercial connection whatsoever, the vessels owned by those companies would be held to be associated. This was a key issue as emerges from the heads of argument filed on behalf of Belfry Marine.<sup>35</sup> Whilst Smalberger JA does not appear to have thought that this was a substantial likelihood it appears not to have concerned him and his colleagues as he put the blame for that situation squarely on the beneficial owner of the associated ship by saying that it was the direct and foreseeable consequence of a ship owner choosing to operate behind a cloak of secrecy. It is hard not to read this as an unspoken condemnation of any situation where the true beneficial owner of the shares in a company is not identified.

(e) **The Heavy Metal - a critique**

There are a number of aspects of the judgments in the *Heavy Metal* that call for analysis. It may be helpful to deal with each aspect under a separate heading.

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adverbs modifying the verb 'control' is perhaps slightly pedantic and a rather narrow approach to statutory interpretation.

<sup>34</sup> In paragraph [15] of the former referring to paragraph [57] of the latter.

<sup>35</sup> In paragraph 1 of those heads of argument it was said:- 'The second question is whether the court *a quo* was correct in elevating the deeming provisions in section 3(7)(b)(ii) to an irrebuttable presumption, incapable (in the present case) of being refuted by explicit evidence to the contrary. On this approach, because specialist maritime lawyers around the world act professionally for registration purposes on behalf of many clients, by virtue of that fact ships with no true links of ownership or control must be regarded as associated ships by South African courts and hence subject to arrest in South African waters in such circumstances.'

Later in paragraph 48 of the heads of argument counsel returned to the same theme in saying:- 'The effect of the decision of Thring J is that an entirely co-incidental nominee shareholding by a legal practitioner to meet the legal requirements of the country of registration could lead to totally unrelated ships being deemed to be associated. Given

(i) **The decision is inconsistent with the underlying basis for an associated ship arrest**

At the outset the most important criticism of these judgments is that they undercut the fundamental premise on which the whole concept of the associated ship rests. That premise was explained and accepted in the case of the '*Berg*' as being that liability for a claim should fall where it belonged by reason of common ownership of the vessels or common control of the ship-owning companies<sup>36</sup>. This involves an incursion upon the principle that companies are separate entities independent of the natural person or persons who benefit from their operations and can be regarded as the beneficial owners of the vessels. However, if it is accepted, as suggested in Chapter 4 that the associated ship jurisdiction is a policy response to the existence of one-ship companies in the operation of a commercially connected group of vessels and the invocation of the separate corporate personality of those companies to enable the beneficial owner to avoid the payment of legitimate debts of one of those companies, there is justification for this incursion. That response is based on the view that this is an exorbitant use of separate corporate personality and that it is appropriate for there to be legislative intervention in that regard. However, it is fundamental to this justification for the associated ship arrest (and indeed any other justification) that the two ship-owning companies are indeed subject to common control.

The point can be illustrated by way of a simple example. If a ship X owned by a company controlled by A incurs a debt and does not pay it, the purpose of the associated ship jurisdiction is to permit the arrest of another ship in pursuance of that debt in circumstances where liability for the debt will ultimately rest on A. To arrest a ship Y owned by a company controlled by B, who is not in any way connected with A, involves a random re-allocation to B of liability for a debt for which A should ultimately be responsible. However, the effect of the judgment in the *Heavy Metal* is precisely this. It holds that because A and B wish to preserve their anonymity as the

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the limited number of admiralty practitioners in any legal community, a vast number of ships might be regarded as associated by the South African courts, whereas in truth they are not.'

<sup>36</sup> Oddly enough Thring J had referred to this principle early in his judgment at 490I, although he appears to have overlooked the amendment to the Act and referred to 'ownership or control of *shares*'. However he did not thereafter deal with the point that his decision was contrary to this principle.



beneficial owners of the ship-owing companies and have chosen to use the same legal practitioner to act as a nominee shareholder in those companies subject to their direction and control, they have created a situation where the two vessels are associated. Even if they thereafter reveal who they are to a South African court and are believed when they deny any business link between themselves and their companies that will be fruitless in the view of the majority. The ships will be associated because they have used the same nominee and that is an end to the matter.

It is hardly surprising that this reasoning ‘struck fear into the hearts of many operators of one-ship companies, particularly those structured and situated in Greece and Cyprus where local attorney nominee shareholders are common’.<sup>37</sup> It is one thing for a ship-owner to know that in South Africa all the vessels that are operated for his benefit will be vulnerable to arrest as associated ships in respect of the debts incurred in relation to any of them. It is an entirely different matter for a ship-owner to learn that his or her vessels are vulnerable to arrest in South Africa because they happen to make use of the perfectly legitimate device of a nominee shareholder in order to preserve their anonymity and have the misfortune to use as their nominee a person who is the nominee of another ship-owner with outstanding debts.

The dismissal of these concerns as being the fault of ship-owners who choose to operate behind a cloak of secrecy is entirely misconceived and unjustifiable. It would not have made the slightest difference to the reasoning in the majority judgment had there been a full and complete disclosure of the identity of the beneficial shareholders in both Belfry Marine and Dahlia Maritime and this had shown beyond any question that they were not the same person. Mr. Lemonaris would nonetheless have been the registered owner of the majority of the shares in both companies. He would therefore have had what the majority called *de jure* or direct control of both companies. In other words if it had been shown that Mr. Lemonaris was ‘a mere puppet dancing

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<sup>37</sup> Hare, footnote 21 *ante*.

at the string of two different masters',<sup>38</sup> the result would have been the same. In those circumstances the *Heavy Metal* would still have been held to be an associated ship in relation to the *Sea Sonnet*.

The unspoken premise underlying the view of the majority was that a desire for anonymity and the use of nominee shareholders to achieve that purpose is in some way reprehensible and if it results in adverse consequences being visited on people who choose to do business in that fashion, so be it. With respect that approach is commercially naive and legally unsound. It is commercially naive because there are many very good commercial reasons why a businessperson will desire such anonymity. Take for example the case of a shipowner that is based in Israel or has strong Israeli links. There is every reason why that owner would want to remain anonymous if a portion of its business operations relates to trading with Arab nations. The converse is also true. The principle is the same as that which caused various ships to be transferred to the British and United States flags during the Iran/Iraq conflict in order to take advantage of naval protection afforded by those two states in the Persian Gulf.<sup>39</sup> Avoidance of political restrictions on trade or the imposition of unwanted commercial burdens in the form of punitive taxes or simply steps to take advantage of government subsidies available in one country but not in another, in circumstances where disclosure of the identity of the ultimate beneficiary of such subsidies could raise public protest, are all sound commercial reasons for desiring anonymity. Leaving aside practical issues such as these, in the case of private companies there does not appear to be anything wrong in principle with the beneficial owners of those companies wishing to preserve their privacy by conducting their business under a cloak of anonymity.<sup>40</sup>

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<sup>38</sup> See Smalberger JA para 13.

<sup>39</sup> Coles *ante* 15.

<sup>40</sup> In a world where kidnapping remains a problem in some jurisdictions anonymity may be a helpful protection for wealthy business people and their families.

This was emphasised in the dissenting judgment of Marais JA<sup>41</sup> where he said:-

‘I cannot subscribe to the proposition that, if the interpretation of the provision favoured by Smalberger JA should result in a third party who has no connection whatsoever with the guilty ship other than that he happened unwittingly to use as his nominee to hold shares in his ship-owning company a person who also holds as a nominee all the shares in the company which owns the guilty ship, losing his company’s ship, that is his fault for ‘choosing to operate behind a cloak of secrecy’. *There is nothing inherently immoral, unethical or reprehensible in nominee shareholdings. The reasons why they may be resorted to in good faith are legion and the interpretation to be given to the provision cannot be grounded upon an assumption that there must always be some or other disreputable purpose lurking behind their use.*’ (My emphasis.)

Whilst this sentiment must be endorsed it should be taken one step further. The only justification for the associated ship arrest is that the same person or persons stands behind both ship-owning companies so that the person who ultimately benefited from the incurring of the debt is also the person who is ultimately required to discharge that debt. If an associated ship arrest is to be permitted in circumstances where the person standing behind the ship concerned is not the same person as the individual standing behind the associated ship, it is wholly irrelevant what the motives of the latter were in creating a one-ship company and preserving his or her anonymity by securing that the shares in the company are registered in the name of a nominee.<sup>42</sup> Even if one

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<sup>41</sup> Para [13]. The impression one has from reading the judgments is that they were written sequentially so that the judgment of Smalberger JA reads like an answer to that of Farlam AJA and the judgment of Marais JA is in turn a reply of that of Smalberger JA. With respect this is not entirely satisfactory although there are a number of other judgments of the SCA where the same pattern can be detected. See for example *Betha and others v BTR Sarmcol, a division of BTR Dunlop Ltd* 1998 (3) SA 349 (SCA), where the sequence is Smalberger JA followed by Olivier JA, Streicher JA and Scott JA and *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (A), where the sequence is Schutz JA, Plewman JA, Botha JA, Van Heerden JA and Nestadt JA. A judgment that reads as a rebuttal of that of another judge tends to concentrate excessively on what are seen to be the flaws in the reasoning of the former and insufficiently on a coherent and convincing analysis of the issue in the case. In part this is due to the approach adopted now for some years by the SCA that judgments should be delivered by the end of the term in which the cases are argued. This arises from the pressures under which that court operates but it can lead to unsatisfactory results. It definitely means that decisions are produced under greater time pressure than is conducive to decisions by the highest court in non-constitutional matters.

<sup>42</sup> It must be borne in mind that a nominee shareholder is not the owner of the shares. They are the registered owner, but their ownership is purely nominal so that at any time the true owner is entitled to demand that the registration in the share register be altered to reflect his or her ownership. They are not in law the owners of the shares. The fact that under the appropriate legislation governing companies they may for some purposes be given recognition ahead of the true owner does not alter that situation. *Sammel and others v President Brand Gold Mining Company Limited* 1969 (3) SA 629 (A) 642 and 633G-H. In *Bell’s Trust v Commissioner for Inland Revenue* 1948 (3) SA 480 (A) 489I Centlivres JA referred to a clear case where ‘A is the registered shareholder, but is a mere nominee for B who is the

assumes that the purpose was in some way improper, such as tax evasion, or the exploitation of the crew on board the vessel by avoiding social security payments or unionisation, or a lax approach to maintenance of the vessel, that is no justification for visiting that beneficial owner with liability to pay debts for the creation and non-payment of which they have no responsibility. Such liability is not a proper response to whatever improper or immoral purpose may lie behind their choice of this type of corporate organisation. On any basis it defeats the underlying purpose of the associated ship jurisdiction and is palpably unfair.

The complaint of unfairness was dismissed in the majority judgment. It was suggested that the result is not as unfair as it might at first blush seem because it lay within the power of the ship-owner to arrange his affairs and his relationship with the company so as to avoid any prejudicial consequences to itself.<sup>43</sup> However, that is not correct. The only way in which a ship-owner wishing to avoid the consequences of the majority judgment could rearrange their affairs would be by securing that the nominee shareholder did not act as such for any other beneficial owner of a one-ship company. That is impractical. A person wishing to acquire a ship through the medium of a one-ship company registered in a jurisdiction such as Cyprus does not wish to have to find the only lawyer or accountant or trust company in that jurisdiction that does not offer its services to any other ship-owner. No doubt such an individual could be identified in the ranks of practitioners specialising in family work or criminal law, but would any sensible person about to invest large sums of money in a ship be willing to risk making use of their services? There are obvious reasons why ship-owners will use the services of lawyers and accountants who are experienced in this field. If they do so then on the majority judgment they run the risk of having their vessel identified as an associated ship merely on the basis that they have used the same nominee shareholder as another ship-owner. It clearly does not lie within the powers of the ship-owner on any sensible basis to arrange their affairs so as to avoid such a result.

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real owner'. In other words the nominee shareholder is not the legal owner of the shares. Nor was Mr Lemonaris the legal owner of the shares in Belfry Marine and Dahlia Maritime, even if the law in Cyprus was that he would be recognised for company law purposes as the shareholder to the exclusion of his principals.

<sup>43</sup> Smalberger JA, para. 15, 1107G-H.

It is a fundamental weakness of the majority judgment that it does not engage seriously with the problems created by its analysis. That problem had been identified in the argument before it and in the judgments of the other two judges.<sup>44</sup> With respect the approach of the majority to this very real problem is quite unsatisfactory and unconvincing. There was in truth no answer to the proposition that their interpretation of the deeming provision led directly to a result that was inconsistent with the fundamental purpose of the associated ship arrest. On that ground alone the majority conclusion cannot be accepted as correct. As a conclusion of law it leads directly to the next proposition namely that the result, as a matter of the interpretation of the Act, is clear and unsustainable breach of the provisions of the Constitution.

(ii) **The favoured interpretation is inconsistent with section 25(1) of the Constitution**

The decision of the majority creates a further problem that will need to be dealt with again in considering the impact of the Constitution on the associated ship jurisdiction. It is, however, appropriate to draw attention at this stage to the fact that the interpretation favoured by the majority must inevitably involve a breach of the rights of the owner of the associated ship under section 25(1) of the Constitution of the Republic of South Africa, 1996 in circumstances where the limitation of rights involved cannot be justified under section 36 of the Constitution. Section 25(1) provides that no-one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. This has been held to be a right that vests in corporate entities. As the section speaks of 'no one' there does not seem to be any basis for not extending its protection to foreign companies.

There is little doubt that the arrest of a vessel involves a deprivation of property in that either the vessel is lost or the owner is compelled to put up security to secure its release. Is the

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<sup>44</sup> Farlam AJA dealt with it at paragraph 76 of his judgment (at 1104) where he said: 'When one has regard to the mischief at which the section is directed, viz the device of hiding the fact that two vessels are associated in that a single person 'owned' them at the relevant times, it becomes obvious that an association based on apparent but not real control was not what Parliament had in mind when it enacted the section. Furthermore, if apparent control were to be held to be sufficient this would lead to the bizarre result to which Mr. Gauntlett referred.'

resultant deprivation arbitrary? On the face of it the answer must be in the affirmative as it involves taking the property of A in order to obtain payment of the debt of B. Whatever justification there may be for that where the same individual stands behind both shipowning companies it is hard to see that there can be any justification for it where the beneficial owners of the two companies are different. In the context of the provisions of s114 of the Customs and Excise Act 91 of 1964, which in certain circumstances permitted property not belonging to the customs debtor to be seized and sold in execution of a debt for customs duty, the Constitutional Court has already held that this constitutes an unjustifiable interference with the property rights of the owner of the goods.<sup>45</sup> The same reasoning must lead to the conclusion that the interpretation given by Smalberger JA to the provisions of section 3(7)(b)(iii) is constitutionally untenable.

All courts in South Africa are bound in interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights.<sup>46</sup> This means that where there are potentially conflicting interpretations of a statutory provision that interpretation should be favoured that is consistent with the provisions of the Bill of Rights and wherever possible an interpretation inconsistent therewith should be avoided.<sup>47</sup> An application of this principle in the *Heavy Metal* clearly

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<sup>45</sup> See *First National Bank of SA Limited t/a Wesbank v Commissioner, South African Revenue Services and another* 2002 (4) SA 768 (CC) para. 37. The court held (in para. 111) that as there was no connection between the owner of the vehicles in question and the customs debt the seizure of the vehicles and their sale in execution constituted an unjustifiable infringement of the owner's rights under section 25(1).

<sup>46</sup> S 39 of the Constitution.

<sup>47</sup> 'There is, it is true, a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although reasonable, would give rise to such an inconsistency. Such a construction is not a reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered.' *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), para [23]. See the discussion in *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* 2001 (1) SA 545 (CC) paras 21-26. The constraint that: 'The provision concerned must be reasonably capable of the preferred construction without undue strain to the language of the provision.' (per Yacoob J in *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC) para [54]) does not present a problem as it is clear that the deeming provision is capable of a meaning different from that ascribed to it by the majority.

favoured the approach of the minority and not that of the majority. The majority approach led to an arbitrary deprivation of property whilst the minority approach did not. Accordingly the minority approach to the interpretative question should have been favoured. On constitutional grounds therefore the majority judgment cannot be accepted.

(iii) **The distinction between *de jure* and *de facto* control of the company and their identification with direct and indirect power to control the company is unjustified.**

Section 3(7)(b)(ii) of the Act provides that:-

‘A person shall be deemed to control a company if he has power, directly or indirectly, to control the company.’

This provision was in the Act in 1983 when it was originally passed at a time when the associated ship provisions referred not to control of a company but to control of the shares of the company. In order to make sense of it in that context it was held that it should be read as if the words ‘the shares in’ were inserted before each reference to ‘company’.<sup>48</sup> However when the associated ship provisions were amended to refer to control of a company instead of control of the shares of the company this deeming provision was not amended. Presumably therefore it is appropriate to approach its construction anew in the light of its new context.

Seen in that light it is a somewhat curious provision. It says that a person who has power to control a company is to be deemed to control the company. However, it is difficult to conceive of a situation where a person who has power to control a company does not in fact control the company, which renders the deeming redundant. If there is a delegation of the power of control this remains an exercise of control, because the delegate is always responsible to account for their actions and the delegation can always be withdrawn. It is only an abdication of the power of control that would seem to fit with the words but the problem with that is that control is given up and passes to the person who takes it up. That person then controls the company not the person

who has abdicated such control. One is therefore driven back to the proposition that having the power of control and controlling the company seem to be the same thing. Once it is accepted, as has generally been accepted since the introduction of the Act and correctly so, that the concept of control of the company is not a matter of managing its day to day operations but consists in the capacity to control its direction and fate, there seems to be little need for a provision that the person who controls the company is to be deemed to control the company. After all if that is the factual situation it is unnecessary to deem it to be so.

If the clause is to have a useful meaning therefore it must flow from the parenthetic words ‘directly or indirectly’. Unlike the court below, which did not explore this phrase, it is central to the reasoning of the majority in the SCA. Its approach was to say that the subsection distinguished between direct power to control the company and indirect power to control the company. It explained the distinction between the two on the basis that indirect power refers to someone who *de facto* wields power through and hence over someone else, whilst direct power was said to be *de jure* power, being the power of someone who in the eyes of the law controls the shareholding.<sup>49</sup> The clear result flowing from this construction was said to be that:-

‘...the power to control directly or indirectly envisages two possible repositories of power, one *de jure* and one *de facto*’.<sup>50</sup>

It is submitted that this distinction is not justified and that it entails a false dichotomy. The power to control a company in the sense of determining its direction and fate cannot reside in two places at once. That is a recipe for a tug of war between the two persons competing to exercise the power of control and the ultimate result must be that one will be dominant and the other subordinate. In Biblical terms the company cannot be the servant of two masters. Whichever one

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<sup>48</sup> *Dole Fresh Fruit International Limited v m.v. Kapetan Leonidas and another* 1995 (3) SA 112 (A) 119H.

<sup>49</sup> Smalberger JA, para. 9, 1106C-D.

<sup>50</sup> Smalberger JA, para. 14, 1107D-E.



is dominant will have the power to control the company. The other will not have the power to control the company in the sense of being able to determine its direction and fate. If the power to control the company bears that sense there can be only one repository of that power. It follows that the necessary consequence of suggesting that there may be two separate repositories of power existing simultaneously is that the meaning of control of the company must be different in each case. This can be illustrated by taking the simple case of a company all the shares in which are owned by X, but registered in the name of Y, her nominee. There can be no doubt that X determines the direction and fate of the company. Y will sign whatever shareholder's or director's resolutions X puts in front of him. He has no power but to do the bidding of his mistress and any attempt to revolt will be quelled by the court. In what sense then can it be said that Y has the power to determine the direction and fate of the company? The only sensible answer is that he has not. Accordingly to speak of Y controlling the company, as well as X, one must be giving a different meaning to the concept of control in the case of Y to that which one gives in the case of X.

There are obvious difficulties with that result. Not only does it contemplate that there may be more than one person who controls the company which owned the ship concerned or which owns the putative associated ship but it contemplates that the nature of their control may be different. The one will be real and actual control having a practical effect on the operations of the company and the other a tenuous and formal control, which has no separate effect because it is always exercised under the direction of the person who has the real power of control. There is nothing in the language of sections 3(7)(a)(ii) and (iii) that even remotely contemplates such a possibility. These sections speak of 'a person who controlled the company which owned the ship concerned' and of 'a company which is controlled by a person'. This language contemplates only a single repository of control and only one type of control namely real or actual control of the company. That control lies in the ability to determine the direction and fate of the company. The provisions of section 3(7)(a) are not capable of being read as encompassing at the same time and vested in different people both the real or actual power to control the company and distinct from it and vested in a different person a power of control which is purely vestigial and consists of performing corporate formalities at the instance of the person who exercises that real or actual

power of control. Unfortunately the majority judgment focuses its attention entirely on the deeming provision and does not consider it in the light of the substantive associated ship provisions to which it relates.

The deeming provision does not refer to and distinguish between *de facto* and *de jure* control of a company. That was an interpretative gloss put on the actual words used in the deeming provision which are ‘the power, directly or indirectly, to control the company’. Leaving the Latin tags aside it is appropriate to examine in the context of a company what constitutes the power to control directly and what the power to control indirectly. The best way to do this is to consider the simple example of a company with a single shareholder X, where the shares are registered in the name of X’s nominee, Y and ask the question whether X exercises direct or indirect control over the company. It is submitted that it is only at an extremely formalistic level that one can suggest that X does not exercise direct control over the company.<sup>51</sup> It is also wholly artificial to say that X exercises indirect control over the company and that direct control vests in Y.

This illustrates the further difficulty namely that of drawing a clear defining line between the power to control a company directly and the power to control it indirectly. It is accepted that the registered owner of shares, who holds those shares in his or her own right and in that capacity is entitled to vote these shares, exercises direct control over the company. The essence of the judgment of the majority in the *Heavy Metal* is that all other situations are to be regarded as examples of a power to control a company indirectly. But that is unrealistic. To say that the mere interposition of a nominee as the registered shareholder, obliged at every point to give effect to the wishes of the true owner and to forego such registration if the true owner so wishes, is not a case of direct control of the company ignores reality. It is an artificial description of the process

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<sup>51</sup> That precise situation had been considered by a strong Court of Appeal in *Bibby (J) & Sons Limited v Inland Revenue Commissioners* [1944] 1 All ER 548 (CA) 550 where Lord Greene MR expressed the opinion that the controlling interest in such a case would be held to be in the true owner, not the nominee. That view was left open in the subsequent appeal but in *Barclays Bank Limited v Inland Revenue Commissioners* [1960] 2 All ER 817 (HL), the majority of their Lordships (Lord Reid, Lord Cohen and Lord Denning) shared the view of Lord Greene MR.

of control of the company. It becomes even more artificial when it is then said that this power of control is indirect and that the nominee exercises directly the power to control the company.

The difficulty of distinguishing between direct and indirect control of the company is illustrated by complicating the simple example set out above. The first step is to insert a holding company, Z, on behalf of whom the nominee Y holds the shares in the ship-owning company. If X is the sole shareholder in Z her control of the ship-owning company is as complete as it would be if Z did not exist. If one asks in that situation who has the power to control the ship-owning company directly, the answer would surely be X, not Y or Z. The position would be the same even if X is only a majority shareholder in Z having distributed some of the shares in that company to her husband and children. An approach that confines the power to control the company directly to the person who, for whatever reason and on whatever basis, is the registered shareholder is not one that would be adopted by any practical person in the business world. The example can be complicated further by introducing other intermediaries and shareholders until the stage is reached when one says that the power to control is now so remote from the exercise of real or actual control that it becomes a power to control the company indirectly.

If the problem is approached from a different direction it is possible to suggest cases of indirect control of a company. Thus there is the example of a ship-owning company where the vessel has been purchased with the assistance of a financier who takes a bond over the vessel and a pledge of the ship-owning company's shares on terms that entitle the financier in certain circumstances of default to take over the operations of the company and the vessel, appoint its own managers and give directions to the registered nominee shareholder in regard to the company's affairs.<sup>52</sup> In those circumstances it is suggested that the control exercised by the financier upon an event of default would be indirect rather than direct.

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<sup>52</sup> Such an arrangement would be similar to a notarial bond over a business such as that in *Barclays National Bank Ltd and another v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd and others* 1982 (4) SA 650 (D).

Little point is served in trying to conjure up further examples lying on the continuum from the power to control the company directly to the power to control the company indirectly. At either end of that continuum it may be possible to identify cases that clearly involve a direct power to control or an indirect power to control the company. At some indistinct point on the line one will pass from one to the other. The identification of that precise point will not be possible.<sup>53</sup>

The point of this analysis is to suggest that where the majority judgment saw a clear distinction between ‘direct’ and ‘indirect’ power to control a company no such clear distinction exists. Once that is recognised it is unnecessary to seek to give a non-existent distinction a meaning. The analysis in the majority judgment is not assisted by seeking to characterise the distinction as one between the *de facto* power to control the company and the *de jure* power to control the company.<sup>54</sup> A problem arises immediately with the exposition of what is intended by the concept of the *de facto* power to control the company. It is said that:

‘Indirect power can only refer to the person who *de facto* wields power through, and hence over, someone else.’<sup>55</sup>

However, that is an unusual and distorted meaning of the expression *de facto*. The ordinary meaning of *de facto* is:-

‘In fact, in reality; in actual existence, force, or possession *whether by right or not*.’<sup>56</sup>  
(Emphasis added.)

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<sup>53</sup> *Hira v Booysen* 1992 (4) SA 69 (A) 77B-F.

<sup>54</sup> It does not assist in the exposition of a statute in the English language for it to be re-cast in what Edward Gibbon referred to as ‘the obscurity of a learned language’.

<sup>55</sup> Smalberger JA, para.9, 1106D.

<sup>56</sup> The *Shorter Oxford English Dictionary*, 5<sup>th</sup> Ed, sv *de facto*, Vol. 1, 623. In *Black’s Legal Dictionary*, 7<sup>th</sup> Ed, 427 it is defined as ‘Actual; existing in fact; having effect even though not formally or legally recognised’.

In other words, when one speaks of the *de facto* power to control the company one is speaking of real or actual power of control, whether or not that flows from any legal right and whether it arises directly or indirectly. It is not an indirect power to control as it may exist and be exercised directly. It is actual or real power to control however arising. It includes both the shareholder who owns the shares in the company in his or her own right and the shareholder who causes the shares to be registered in the name of a nominee. However in the judgment it is used in an unusual and restrictive sense as relating to the situation where power is wielded 'through, and hence over, someone else', thereby excluding the first and most obvious case of *de facto* control namely where the shares are owned by a person in their own right and for their own benefit. With respect that is a distorted meaning and it creates a false antithesis with the concept of the *de jure* power of control. The latter ordinarily conveys the notion of power exercised by legal right.<sup>57</sup> Again it is irrelevant whether the right is said to exist directly or indirectly. What is important in both expressions when applied to the power to control a company is that whichever expression is used one is still speaking of power to control the company and that requires that there actually be power to control. The distinction lies in the source of that power rather than in the type of power being exercised.<sup>58</sup>

The problem with this antithesis is illustrated by the fact that in later portions of the judgment the expression '*de facto* power' is used in its ordinary sense. Thus having said that what is envisaged are two possible repositories of power, one *de jure* and one *de facto*, it goes on as follows:-

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<sup>57</sup> The *Shorter Oxford English Dictionary*, ante, sv '*de jure*', 630 gives 'rightfully, according to law' and *Black's Legal Dictionary*, ante, 437 gives 'existing by right or according to law'.

<sup>58</sup> The distinction is more pertinent in an entirely different context. It is illustrated by the cases arising from the declaration of UDI in what was then Rhodesia and is now Zimbabwe. There the courts had to grapple with the problem arising from the fact that the government of Mr Smith wielded *de facto* power in the country and whether the courts should give this *de jure* recognition. *Madzimbabuto v Lardner-Burke NO and another NO* 1968 (2) SA 284 (RA). On appeal to the Privy Council the Board held these arguments to be inapplicable on the grounds that the British government was continuing with efforts to displace the usurping government and therefore that the relevant principles of international law did not apply. *Madzimbabuto v Lardner-Burke and another* [1968] 3 All ER 561 (PC) 573H-575B.

‘If there can only be one repository of power in terms of the subsection it would follow that the person who has *de jure* control could be ignored once it has been established that someone else has *de facto* power.’

Not only is this using the expression *de facto* power in its ordinary sense but it does not deal with the fact that *de facto* power may also be *de jure* power and, in the corporate situation, usually is. There is no suggestion that in the examples set out above X is not exercising actual or real power of control over the company and is doing so because she has a legal right to do so enforceable in the appropriate courts.

It is submitted that the basic flaw in the reasoning in the majority judgment lies in the notion that there is a clear distinction between ‘direct’ and ‘indirect’ power to control a company and that the legislature intended such a distinction. The distinction is by no means clear or easy to draw and the intention to draw such a distinction is not apparent from the statute. Normally when the expression ‘directly or indirectly’ is used in a statute or a contract it is used as a composite adverbial phrase to indicate that the statutory or contractual provision will apply irrespective of the means by which the particular result that is its subject is achieved. In other words, it will not matter whether the thing is done directly or indirectly. Its use ensures that all possible cases of the particular action in question are covered irrespective of whether they would be described as being performed directly or indirectly. That avoids any argument that the statute or contract in question only applies to the particular act where it is done directly and not where it is achieved through indirect means. These are hair-splitting arguments involving nice distinctions of little practical relevance. They are directed at showing that what was done, was only an indirect way of performing the act in question, and accordingly falls outside the scope of the prohibition or provision. The use of the phrase ‘directly or indirectly’ is designed to forestall such arguments.

There are countless examples in contracts of the use of the composite expression ‘directly or indirectly’ in this fashion. In the contractual arena one common example is in a contract in restraint of trade that prohibits the restrained person from competing directly or indirectly with the party in whose favour the restraint operates. The whole purpose of couching a restraint in such terms is to ensure that the restrained person is not able to advance arguments that they

themselves are not competing but that a company in which they have an interest is competing with the party in favour of whom the restraint was given.<sup>59</sup> The inclusion in the restraint of the words ‘directly or indirectly’ precludes an argument that the person restrained is not competing with the party in whose favour the restraint operates because the competition is by a company that has separate corporate personality, although its shares are entirely owned by the restrained person.

Similarly there are numerous examples of the expression ‘directly or indirectly’ being used in statutes and always for the purpose of ensuring that all acts of a particular class, however performed, whether directly or indirectly, are brought within the compass of the particular section.<sup>60</sup> Perhaps the most important instance of their use is to be found in the equality clause of the Bill of Rights. Section 9(3) of the Constitution<sup>61</sup> provides that the State ‘may not unfairly discriminate directly or indirectly against anyone’ on various stated grounds. Section 9(4) extends the prohibition in the same terms to any person. Manifestly the purpose of using the expression ‘directly or indirectly’ is to ensure that all cases of unfair discrimination are covered by these prohibitions not to distinguish between direct and indirect discrimination.

The range of statutes in which the expression is to be found is diverse. It includes the Competition Act<sup>62</sup>, the Consumer Affairs (Unfair Business Practices) Act<sup>63</sup>, the Copyright Act<sup>64</sup>,

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<sup>59</sup> See the decision in *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (CA); [1933] All ER Rep 109 approved and followed in *Le’Bergo Fashions CC v Lee and another* 1998 (2) SA 608 (C) 612D-E.

<sup>60</sup> An electronic search of the statutes reveals 1140 examples of the use of this phrase.

<sup>61</sup> The Constitution of the Republic of South Africa, 1996

<sup>62</sup> Act 89 of 1998 where the expression is used in the definitions of ‘acquiring firm’ and ‘target firm’ in section 1(1); in the definition of a merger in section 12(1)(a) and in describing a restrictive horizontal practice in s4(1)(b)(i).

<sup>63</sup> Act 71 of 1988 in the definition of ‘unfair business practice’ in s1.

<sup>64</sup> Act 98 of 1978 in the definition of ‘computer program’ in s1(1) of the Act and in ss8(g), 9(a) and (b), 10(a) and 11(b)(h) in dealing with the nature of copyright.

the Films and Publications Act<sup>65</sup> and various statutes imposing prohibitions on electoral officials<sup>66</sup>. It appears in a number of statutes dealing with criminal law<sup>67</sup> as well as in various provisions of the Income Tax Act<sup>68</sup>. It is even used in a similar context in the definition of a controlling interest in section 2(1) of the Liquor Act.<sup>69</sup> The range of instances where the expression is to be found is extraordinarily wide. Most significantly for present purposes is that it is invariably used as a comprehensive expression to indicate that the particular action that it qualifies is covered by the statutory provision however it may be performed. Whilst the reference to something being done indirectly clearly broadens the range of operation of the provision<sup>70</sup> it cannot have the effect of including conduct that is not of the type referred to in the statute. Thus section 226(1) of the Companies Act<sup>71</sup> provides that no company shall ‘directly or indirectly’ make a loan to various specified parties. It has been correctly held that the use of the expression ‘directly or indirectly’ cannot extend the prohibition to cases that do not in any form or guise involve the making of a loan to one of the specified parties.<sup>72</sup> There may be instances where it is necessary for the court to consider and possibly limit the notional scope of the concept of doing

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<sup>65</sup> Act 65 of 1996 in s7(1)(c) dealing with the qualification of members of the Board and Review Board established under that Act.

<sup>66</sup> In ss82(6) and 83(7) of the Electoral Act 73 of 1998; s9(2)(b) of the Electoral Commission Act 51 of 1996; in s37(6) and 38(7) of the Local Government : Municipal Electoral Act 27 of 2000 and in ss4(2)(a), 6(2)(b) and 8(1) of the Independent Electoral Commission Act 150 of 1993.

<sup>67</sup> For example the Financial Intelligence Centre Act 38 of 2001, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, the National Gambling Act 7 of 2004, the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Prevention of Organised Crime Act 121 of 1998.

<sup>68</sup> Act 58 of 1962.

<sup>69</sup> Act 27 of 1989 referring in turn to the definition of ‘controlling interest’ in s1 of the Maintenance and Promotion of Competition Act 96 of 1979. *Kloko v Sullivan* 2006 (1) SA 259 (SCA), para. 4.

<sup>70</sup> *Olley v Maasdorp and another* 1948 (4) SA 657 (A) 665-7

<sup>71</sup> Act 61 of 1973

<sup>72</sup> *S v Pouroulis and Others* 1993 (4) SA 575 (W) 589-601.



something ‘directly or indirectly’<sup>73</sup> but this does not affect the principle. Such a limitation is merely an endeavour to comprehend the precise scope of what is encompassed by the notion of doing the act in question directly or indirectly.

In the plethora of instances in which the expression ‘directly or indirectly’ is used there is no case that I have been able to find in which it has been suggested, as was suggested in the majority judgment, that the expression is intended to distinguish between those things that are done directly and those that are done indirectly and thereby to create two different classes of actions. In all cases it is accepted that the effect is to extend the scope of the provision so that all acts of the particular type are comprehended, however they are to be performed. In other words the expression is read as intending to convey comprehensively that all actions of a particular type are encompassed by the provision no matter how they are performed.

It is submitted that the expression is used in this manner in the deeming provision in section 3(7)(b)(ii) of the Act. The purpose of the deeming provision is to make it clear that when the Act speaks of control of a company it is concerned with real or actual control of that company not with an artificial concept of control created by the appearance of the share register of a company. There can be no doubt that in the formulation of these provisions all concerned were aware of precisely the type of factual situation that arose in the *Heavy Metal*. It is submitted that the intention in enacting the deeming provision was to make it clear that when the Act spoke of the control of the company it was concerned not with matters of outward appearance but with actual or real control as it is only actual or real control of both companies concerned that provides a justification for the entitlement to arrest an associated ship instead of the ship concerned. Properly construed the deeming provision does not create an artificial distinction between the power to control a company directly and the power to control it indirectly, but reinforces and emphasises what emerges from section 3(7)(a) namely that the Act is concerned with actual or real control of companies.

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<sup>73</sup> As in the case of the prohibition in s38(1) of the Companies Act 61 of 1973 on a company giving ‘whether directly or indirectly’ financial assistance for the purchase of shares in that company. *Gardner and Another v Margo* 2006 (6)

This does not render the deeming provision redundant. So construed it serves the useful purpose of putting beyond doubt a particular construction of the concept of control that might otherwise have been uncertain.<sup>74</sup> In the absence of such a provision it would have been open to the beneficial owner of the shares in a company to contend that when control of a company was referred to in section 3(7)(a) that was to be construed as a reference to the legal form of control arising from the terms of the share register and accordingly that it was impermissible to go behind the share register to identify the party who in reality controlled the company. This was precisely the approach that had been adopted by the majority in a very formalistic decision of the House of Lords in the income tax case referred to in the judgment of Farlam AJA.<sup>75</sup> On the suggested construction of the deeming provision the answer to such a contention would be that the concept of control under the Act was one of actual or real control and that it mattered not that control was only exercised indirectly. It is ironic that a provision intended to prevent artificial arguments by the beneficial owners of vessels has been construed as endorsing equally artificial arguments by claimants.

Viewed from the correct perspective the deeming provision serves almost precisely the opposite function to that conceived by the majority judgment. It makes it clear that questions of association are to be determined by having regard to the actual or real power to control the

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SA 33 (SCA), paras. [46] and [47].

<sup>74</sup> Lord Radcliffe in his speech in *St. Aubyn (LM) and others v Attorney General (No. 2)* [1951] 2 All ER 473 (HL) 498F-H identified three possible functions of a deeming provision. He said: 'The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'

The deeming provision in s 3(7)(b)(ii) is of the second type. An example of its use in this fashion is to be found in *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and others (Fund constituting the proceeds of the sale of the mv Forum Victory)* 2001 (3) SA 529 (SCA), para [16].

<sup>75</sup> *Barclays Bank Limited v Inland Revenue Commissioners* [1961] AC 509 (HL); [1960] 2 All ER 817 (HL). In a sardonic comment on the state of English tax law at this time Robert Stevens says: 'Tax law had become an elaborate form of chess or crossword puzzle with the courts giving the appearance of joining in the game.' R Stevens, *The English Judges; Their role in the changing constitution* (2002), 27. That high formalism has now been abandoned. *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 All ER 97 (HL), paras 26-33.

companies in question. Accordingly the mere fact that two companies have the same shareholder may not suffice to show that the same person has power to control both where it can be shown that the registered shareholder is a nominee of two separate and distinct parties. It was intended to forestall the argument that was accepted in the *Heavy Metal* that the reality of the power to control the two companies could be ignored in favour of registered ownership. The section is not directed at facilitating arrests in circumstances in which the underlying rationale for the associated ship arrest is not present. It does enable the persons whose shares are registered in the name of the same nominee as the shares of the owner of the ship concerned to come forward and by demonstrating that the registered shareowner is their nominee to rebut the case that the vessels are associated.<sup>76</sup> It is intended to avoid the very argument that arose in the *Heavy Metal* by making it clear that actual or real control is what was intended.<sup>77</sup>

Once the deeming provision is properly construed the question whether it was rebuttable or irrebuttable falls away. Properly construed the provision means that for the purposes of determining whether a ship is an associated ship in terms of section 3(7)(a) of the Act, where that is dependent upon control of a company owning the ship concerned and control of a company owning the alleged associated ship, a person who has the power to control either company, whether directly or indirectly, is deemed to control the company. Clearly that deeming is not rebuttable and it goes to the heart of the nature of control with which the section is concerned.<sup>78</sup>

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<sup>76</sup> In other words it does cater for the situation referred to in paragraph 13 of the majority judgment where the owner of the targeted ship is able to show that the registered owner of the shares in the two companies is a mere puppet dancing at the string of two different masters. This paragraph demonstrates the fallacy of replacing direct control with *de jure* control and indirect control with *de facto* control. It overlooks the fact that *de facto* control may arise both directly and indirectly.

<sup>77</sup> In other words it was aimed at avoiding the argument that arose in the case of *Barclays Bank Limited v Inland Revenue Commissioners*, *supra*, where the majority in the House of Lords adopted the extreme literalist approach to the interpretation of taxing statutes that has now long since been abandoned by that court.

<sup>78</sup> *S v Rosenthal* 1980 (1) SA 65 (A) 90.

(iv) **The presumption that foreign law is the same as South African law should not have been applied.**

In both the lower court and on appeal there was general acceptance of the proposition that, in the absence of evidence to the contrary, foreign law should be assumed to be the same as South African law. This was used both by Thring J in the court below and in the majority judgment to justify reliance upon the provisions of section 440A of the Companies Act, as it then existed, in looking at what constituted control of a company. On a proper construction of the deeming provision this question does not arise. However, that the judgment relied on for this proposition is in fact one that raises a serious question mark as to its correctness.<sup>79</sup>

It is submitted that this is an extremely dangerous presumption to rely upon in the context of the company laws of a foreign country. As it happens Cypriot company law is based upon the English Companies Act of 1948. However, companies incorporated in that country fall into separate categories. In the case of an off-shore company engaged in shipping operations the company is required to obtain clearance from the Central Bank of Cyprus, which requires disclosure to the bank of the identity of the beneficial owner of the shares in that company. In those circumstances it is by no means clear that a Cypriot court would take the same view of the power to control a Cypriot off-shore shipping company as was taken by the South African court. Had the Court approached the question of interpretation without any presuppositions about the content and effect of the law of a foreign country it is suggested it would have been hesitant to reach the conclusion it did as to the meaning of the deeming provision.

Indeed it is submitted that a further reason for construing the deeming provision in the manner set out above is that it avoids the need to engage with the complexities of foreign legal systems in regard to the operation of companies. The question then becomes the more practical question of where the actual or real power to control the company lies irrespective of the means

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<sup>79</sup> *Caterham Car Sales and Coachworks Limited v Birkin Cars (Pty) Limited and Another* 1998 (3) SA 938 (SCA), para. [34].

that are adopted for that purpose. Again this highlights the fallacy of the distinction between *de jure* and *de facto* control. However indirect the power to control may be it will almost inevitably be a power exercisable through legal structures in relation to the company concerned in accordance with the legal system of the country where it is incorporated. In other words whatever commercial structures and nominees may be interposed between the true beneficial owner of the company and the company itself, the true beneficial owner will ensure that those structures are of such a nature that he or she can always enforce their power of control by having resort to appropriate courts. Accordingly the power to control, however indirect, will be a *de jure* power as well as a *de facto* power.

(f) **The Heavy Metal - a conclusion.**

It is submitted with respect that the decision of the majority in the *Heavy Metal* is wrong in relation to the interpretation given to the concept of control of a company for the purpose of the associated ship arrest provisions of the Act and wrong in relation to the primary issue of the construction of the deeming provision in section 3(7)(b)(ii) of the Act. As already indicated the decision on the facts by Marais JA is one that appears sound on the basis that the concept of control in the section means actual or real control. However it is the legal consequences of the decision that are important. Fortunately it has not so far generated problems in practice partly at least because of the commonsense of legal practitioners and claimants who would not wish to discredit a system that is favourable to them. However that is in principle an undesirable situation. Only the SCA itself or the Constitutional Court on appeal from it can alter the decision and there may be substantial difficulties in having the matter ventilated again before either of those courts. In the circumstances it is submitted that it is desirable that the problem be clarified by legislation. This could be achieved most simply by repealing section 3(7)(b)(ii) in its present form<sup>80</sup> and replacing it with the following:

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<sup>80</sup> Its loss would hardly be lamented. On both occasions where it has been considered by the SCA it has caused substantial problems of interpretation.

‘Control of a company shall be constituted by the power to direct its affairs whether that power is exercised directly or indirectly.’

Such a provision would give effect to the intention underlying the associated ship arrest provisions and to the proper rationale for such provisions<sup>81</sup>. Until such an amendment is effected however lower courts are bound by the decision of the SCA although it could be challenged if a suitable opportunity arose before the SCA.

#### 4 **THE PROPER MEANING OF CONTROL.**

It is submitted that the following are the features of the concept of control that emerge from a correct analysis of the statutory provisions governing associated ship arrests. Firstly what must be sought is a single repository of control. Secondly, and flowing from the first, it is actual control that must be identified. Thirdly the subject matter of control must be the direction and policy of the ship-owning company, not necessarily its day to day management. In other words what is sought is the directing mind and will behind the company. Fourthly it matters not whether control is exercised directly or indirectly. What is important is that the actual repository of the power to control the company must be identified. Fifthly the court is not in general concerned with the niceties of the corporate law of the jurisdiction where the company is incorporated. The fact that for the purposes of the domestic law of the company recognition is only given in regard to its affairs to a person’s status as registered shareholder will not matter if in fact the person concerned acts on the directions of a third party who is by some legal means entitled to give those directions.

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<sup>81</sup> There has been some discussion of this within the ranks of the MLA but no conclusion has been reached. In a memorandum submitted to the AGM in 2007 it is said that the majority in the Cape Chapter are opposed to an amendment on the basis that: ‘The view was that the shipping world was bedevilled by owners who hid their identity and operated under a cloak of secrecy, and that the majority judgment was a welcome step towards greater transparency.’ Regrettably this confuses the conduct of some shipowners with a proper and justifiable approach to the interpretation of a useful statutory intervention. The majority judgment does not promote transparency because transparency will not assist to overcome an association based on the use by separate owners of the same nominee.

However for so long as the *Heavy Metal* judgment stands these propositions are subject to some qualification. In terms of that judgment it is possible to have at the same time two repositories of the power to control a company, namely legal control and actual control. The search is not restricted to one for actual control and if legal control is established, in the sense of the same registered shareholder or shareholders in each company irrespective of whether they are merely nominees for the true shareholders, actual control will only be relevant as an aid to the arresting creditor. Beyond that situation however it is submitted that the propositions set out above are correct. The problem lies in any given situation in the application of the principles.

## **5 POTENTIAL PROBLEMS IN RELATION TO CONTROL**

Within the corporate context the application of these principles is relatively straightforward. The primary difficulty lies in obtaining the evidence necessary to establish the chain of control. Problems tend to creep into the picture when one is not dealing with a single corporate structure. Where two or more shipowners form an association for the purpose of working a particular trade, which may be a loose arrangement, a joint venture or something as formal as a conference line<sup>82</sup>, the outward appearance of matters may well be that the different vessels used for the venture are part of a single fleet but that may be misleading. Similarly there may be situations where different investors in ships make their vessels available to a single fleet manager to operate jointly but for the separate benefit of all the participants. This gives economies of scale in the operation of the fleet but it is nonetheless feasible for the managers to account separately to each owner for the operation of its vessel. Situations such as these may give rise to an appearance of association but the reality may be different.

The position may be different where a ship manager essentially constitutes and controls a fleet with financing from outside but passive investors. There are two ways in which this can be done. In the one case a company can be created as the vehicle for the investors who will acquire

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<sup>82</sup> The early case of *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D) involved a joint chartering arrangement between four shipping lines carrying cargo to and from Japan.

shares in that company. The manager will then select vessels, acquire them, arrange finance and operate the shipping line. Each ship will be owned by a separate one-ship company and all these ship-owning companies will be owned by the investment company. In that situation all the ships will be associated ships. A different approach is for the shares in each ship-owning company to be held in different shares by different investors and a different body of investors funds each new acquisition. The result is that the shareholding of each ship-owning company is different and carefully managed the situation will never arise where two or more vessels have the same group of majority shareholders. In fact that situation is never allowed to arise as it would have the potential for the investors to displace the manager. In that situation the commercial result is virtually identical to the first example but the differences in shareholding of the ship-owning companies paves the way for an argument that the vessels are not associated ships because the ship-owning companies are not controlled by the same people. However, if the fleet is effectively the fleet of the manager and the role of the investors is entirely passive then it can be argued with considerable force that it is the manager who controls the companies owning the vessels in the fleet and therefore that all the vessels in the fleet are associated ships. This would be a case of indirect control.<sup>83</sup>

The same or at least a similar problem will also manifest itself in a situation where the fleet is owned and operated for the benefit of a family with a number of members. It may be that within the family different members will hold different shareholdings in the different vessels comprising the fleet. However the operation of the fleet as a single commercial entity managed by a single manager (often itself a family company) indicates that there is a sufficient measure of common control for the vessels in the fleet to be associated ships. This may be especially the case where certain key members of the family are in effect responsible for all decisions in regard to the conduct of the business of the fleet. Evidence of cross-mortgages or cross-guarantees or of a family-owned management company guaranteeing the debts of different companies in the group will all support the inference of common control. It matters not in that situation whether one says

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<sup>83</sup> C/f *The Amer Whitney: Shippers D'Singapore Pte Ltd v Amer Whitney* SCOSA C86 (D). The point has arisen in one recent case that has yet to be argued and may well never be argued.



that the key members of the family indirectly control the ship-owning companies or that the family as a collective entity controls the entire group of companies.

A more complex situation has arisen in the case of shipping fleets operating in the context of Communist or former Communist states. As the economies of those companies have become more open and sought to adapt in the context of globalisation this has given rise to particular difficulties in the context of the associated ship arrest. The matter has come to the fore in cases involving Cuba, which continues to claim that it is a socialist state operating in accordance with the tenets of Marxist-Leninism, and in relation to China, which since the economic reforms initiated by Deng Xiaoping after the death of Mao Zedong, moved rapidly to a market economy whilst the political hegemony of the Communist Party remained in place. Both situations have given rise to cases in which the associated ship jurisdiction has been invoked.

In the case of Cuba the country's fleet was transferred to a range of one-ship companies established in Malta and Cyprus but ultimately controlled by the nominees of the Cuban government.<sup>84</sup> A vessel was arrested in Durban as an associated ship in relation to a debt arising from the charter of another vessel. The allegation was that the Cuban government ultimately controlled both the chartering company and the ship-owning company. Reliance was placed on the constitution of Cuba, which proclaimed the State's ownership of property. Clear links were established between the different ship-owning companies and their operations as part of a single fleet, centrally controlled. The persons nominally controlling the companies were State employees seconded for that purpose. The argument on behalf of the respondent was not assisted by it being demonstrated that the defence originally raised was false as was the replacement defence. The level of state intervention in the affairs of the ship-owning companies was such that it was impossible for it to be said that the Cuban state had divested itself of the ownership and

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<sup>84</sup> *MV Bacanao: Transportes del Mar SA v Jade Bay Shipping Co Ltd*, A119/95 (DCLD), Shipping Cases of South Africa, C42. An appeal to the SCA was abandoned shortly before the hearing when an application to lead further evidence on appeal was lodged with a view to placing before the court affidavits filed in another matter by the Cuban deponents in which they admitted the falsity of the statements of fact in their previous affidavits. This so undermined their credibility that the appeal became hopeless.

control of the vessels that had admittedly existed from the establishment of the Cuban state as a communist state after Fidel Castro's accession to power. At the end of the day the case establishes no new principle as it turned on its own facts.

A more difficult situation has arisen in cases relating to Chinese vessels from the Peoples' Republic of China, where it is sought to claim an association in relation to two vessels operating at different levels of the State but both being 'state-owned enterprises'. The problem has arisen in several cases and has received the attention of the Supreme Court of Appeal.<sup>85</sup> The case involved the security arrest of the *mv 'Le Cong'*, which was owned by Guangzhou Ocean Shipping Company, a state-owned enterprise, itself owned by another state-owned enterprise, which was established and funded by the central government. The debt had been incurred by another entity Shantou Sez Chemical Industry and Petroleum Gaz General Company, which was a state-owned enterprise established and funded at the municipal level. The claimant contended that because both were state-owned enterprises they were associated ships as being subject to common control. Guangzhou challenged this claiming that in accordance with Chinese constitutional law the two were not subject to common control at all. The differing contentions were summarised as follows:

'[9]The evidence of Guangzhou's experts, which formed the basis upon which it was sought to set aside the arrest order, was shortly the following. While Guangzhou and Shantou Sez were described as "state-owned enterprises" and said to be owned "by the whole people", the concept of ownership in this context in Chinese law is a complex one, is largely abstract and does not correspond to the concept of civil ownership in western legal systems. Of greater significance, however, was the distinction between the levels of government at which the two enterprises were established and funded. Guangzhou was established and funded at the level of the central government; Shantou Sez was established and funded at municipal level. In this regard, (and this was common cause, or not in dispute) Guangzhou is one of several ship-owning state-owned enterprises established by China Ocean Shipping (Group) Company, itself a state-owned enterprise, which in turn was established and funded by the central government. Shantou Sez, on the other hand, was established by an enterprise called City Petroleum Chemical Industry Company (later renamed Shantou Wuzhou (Group) Company) which in turn was established and funded by the Shantou City Municipal Government. Each level of government is elected by popularly elected bodies. These are, in the case of the central

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<sup>85</sup> In *International Marine Transport SA v MV 'Le Cong' and another* [2005] ZASCA 106; SCOSA C107.

government, the National People's Congress and in the case of the lower tiers of government, local people's congresses. In accordance with its Budget law China implements a system of central and local taxation with each level of government having its own independent financial status and being vested with exclusive rights in relation to the capital funds within its own particular budget. A state-owned enterprise established at a particular level of government, eg at municipal level, would be established with funds emanating from the budget at that level and such an enterprise would be subject to the control of the government at that level. Accordingly, in the present case, so the evidence went, the power to control Shantou Sez vests in the Shantou City Municipal Government and is exercised through Shantou Wuzhou (Group) Company. The central government is in law precluded from exercising control in respect of Shantou Sez or any of its assets. The powers of the central government are limited to those which one would expect to be vested in the central government of a largely unitary state and would relate typically to the promulgation of administrative rules of a general nature. [10] The response of the appellant's experts was to the effect that the funding of the organs of state at different levels did not establish independence between them; that there was no warrant for giving the words "state-owned enterprise" anything other than their simple express meaning and that the reality of the People's Republic of China was that the central government controlled the provincial and municipal arms of the government which enjoyed no independence under the constitution.'

The Court seemed hesitant to step into the legal minefield created by these opposing contentions. It pointed out that:

'[13]... The closer the system is to ours the more readily a court will rely upon its own judgment when faced with a problem of interpretation. In the present case, however, the People's Republic of China not only has a legal system different from ours but its constitutional and social structures are vastly different, as is its political philosophy and culture, and it is in this context that its laws must be interpreted. Some examples will illustrate the point. Article 1 of the constitution describes the People's Republic of China as a socialist state "under the people's democratic dictatorship". Article 2 proclaims that "all power...belongs to the people" while article 6 speaks of "ownership by the whole people and collective ownership of the working people". These are all concepts which are wholly foreign to our constitution and legal system'

It then weighed up the conflicting contentions of the parties on the relevant constitutional provisions and concluded that the claimant had failed to discharge the onus of showing that the *mv 'Le Cong'* was an associated ship in relation to the ship concerned.

This was an unfortunate conclusion as it meant that the court did not express a view on the legal issues posed by such a situation. It is submitted that it is questionable whether the concept of control in the Act extends to the type of political control that formed the basis for the

appellant's arguments in that case. None of the cases dealing with associated ship arrests deals with the situation where the climb up the corporate ladder in each instance arrives at wholly different governmental entities that are not even companies for the purposes of the Act. Can the concept of control in the context of the operations of a commercial entity such as a company be readily translated to the different arena of the political structure of a state? There are obviously marked differences between the control which can be exercised through the mechanism of company law and the manner in which governmental organisations operate, which are not in general matters of company law but raise questions of constitutional law and the functioning of the body politic within a particular state.

Thus, for example, in this case the thesis advanced was that because of the central political role which the National People's Congress plays in the governance of the People's Republic of China, the it must be seen as controlling, for the purposes of the Act, the two companies that were relevant to the case. In earlier litigation, which unfortunately did not proceed to judgment, the contention went even further and it was said that because of the pivotal role of the Chinese Communist Party in all affairs of state in China any two state-owned enterprises would be subject to common control and hence their vessels would be associated ships.<sup>86</sup>

It is submitted that it is highly debatable whether this is the type of control that the Act contemplates in order to establish an association. Were that so then in any democratic state where one party is electorally dominant at every level of society, as was the case in Mexico from 1927 until 1999, and has a mildly socialist agenda proclaiming for example that the State should dominate the commanding heights of the economy, it could be argued that the State or that political party controlled all economic activity in that country. Such a broad concept of control is not, it is submitted, what the Act contemplated.

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<sup>86</sup> The case was that of *mv 'Heng Yu': G Hinrichs and Company Shipping GmbH v mv 'Heng Yu' and another* A199/99 (DCLD). After argument and shortly before judgment was due to be delivered the case was settled.

In corporate situations such as those mentioned above where one is concerned with the control exercised via a holding company or nominee shareholders, or the control arising from financing arrangements and the like, the essential element is that on a day to day basis the person exercising the control has the immediate legal power to instruct the registered shareholder in regard to his or her actions concerning the company and thereby to determine the direction and fate of that company. The power to intervene in that company's affairs for the purpose is immediate and legally effective. It is accepted that there may well be cases where such a power will vest in a government, for the purposes of section 3(7)(b)(ii) of the Admiralty Act. The case of the *mv 'Bacanao'* referred to above may provide an example of a situation where a government's presence and control is so pervasive throughout every aspect of society that it can genuinely be taken to control even its commercial operations. In that case the Cuban government had always owned and operated directly the vessels that had been transferred to separate companies. It was established that the purpose of the transfers was to disguise the interest of the Cuban government in the vessels and to avoid the payment of debts incurred in the operation of the Cuban fleet. Whilst the Cuban government was not the registered shareholder in the one-ship companies those shareholders all worked for a single Cuban state organisation operating directly under the government. In those circumstances the involvement of the Cuban government in the companies was closely analogous to that which arises in the conventional corporate situation where a holding company or an individual exercises control indirectly over a company, but that control is immediate and enforceable on a day to day basis. It is submitted that it is this type of control that needs to be demonstrated for the purposes of section 3(7)(b)(ii).

The section refers only to 'power to control' the company. It is then said that this power may be either direct or indirect. That does not, however, alter the nature of the power but merely the manner in which it is exercised. In the case of direct power to control a company the shareholders can intervene at any stage in its affairs to determine its direction and fate. It is submitted that where reliance is placed upon indirect control then it must be shown that the power to control the company vested indirectly in a person other than its shareholders must similarly be a power to intervene directly in its affairs on a day to day basis in order to determine its direction and fate. This control is entirely absent in the case where a government is politically

dominant in a country and adopts communist or socialist terminology to describe its political and economic programme. If reliance is to be placed upon political control then it is submitted that the control that must be demonstrated must be akin to that which exists in a corporate environment where control is exercised in a manner that is capable of having an immediate effect on the day to day operations of the entity that owns the ship in question. Anything more remote than this is not it is suggested control within the meaning of that expression in the associated ship provisions of the Act.

## CHAPTER 8

### SINGLE OR MULTIPLE ARRESTS?<sup>1</sup>

#### 1 INTRODUCTION

The associated ship jurisdiction was plainly instituted for the purpose of assisting maritime claimants to enforce their claims and obtain payment. As such it embodies a clear legislative choice in favour of shippers and the creditors of ships over the interests of shipowners<sup>2</sup>. In conception it was primarily directed at the recalcitrant or elusive debtor and, where the debtor in question was a ‘one-ship’ company, those standing behind that company as beneficial owners or controllers thereof. However, its usefulness to claimants goes beyond this because, when used in conjunction with the power to grant a security arrest in terms of section 5(3) of the Act, it enables claimants to obtain the benefit of security in respect of claims that would otherwise have to be pursued without security. The advantage of this must not be under-estimated.<sup>3</sup> It is not simply that the claim is secured. The provision of security has cost implications for the defendant and its availability removes the risk of the litigation proving fruitless, which might otherwise be an incentive to the claimant to abandon the claim or accept an offer of settlement. The need to provide security places commercial pressure on the debtor to settle the claim. The original debtor may well be a company that is a shell because its only significant asset, the ship in respect of which the claim arose, has been lost or disposed of. In those circumstances the arrest of an associated ship and the obligation to provide security in order to secure its release may well

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<sup>1</sup> The contents of this chapter owe much to my article ‘*The Associated Ship Jurisdiction in South Africa: Choice Assorted or Only One Bite at the Cherry*’ 2000 LCMLQ 132. In some respects however my views have altered since then.

<sup>2</sup> Robert Fisher QC, ‘*The Purpose of Admiralty Law*’ (2004) 18 MLAANZ Journal 14, 17-18.

<sup>3</sup> Writing in 1860 Coote, *The New Practice of the High Court of Admiralty*, 131-2 pointed out that no-one would proceed *in personam* if they could proceed *in rem*. The reason was simply that the latter procedure provided security by way of the arrest of the vessel or bail or security provided to prevent the arrest or secure its release.

prompt the settlement of the claim, particularly if the grounds for resisting it on its merits are limited.

Where the focus of an associated ship arrest is to obtain security for a claim the arrest itself usually results in the furnishing of the required security and sometimes the settlement of the claim itself. Provided that the target of the arrest is a profitable trading vessel security will usually be established and that will be an end to the matter. No question of a further arrest will arise. Similarly where the purpose of the arrest is not simply to obtain security but to commence an action *in rem* in South Africa, provided security is forthcoming in response to the arrest the action then proceeds without any need to contemplate a further arrest.

As security is usually forthcoming in response to an arrest, whether it is a security arrest under section 5(3) of the Act or an arrest to commence an action *in rem*, the problem of a possible multiplicity of arrests is not likely to arise very often and has not done so in practice.<sup>4</sup> However, in cases of the type for which these provisions were originally devised, where the debtor is recalcitrant or evasive and particularly where the debtor is in straitened financial circumstances, the issue is a real one. Where a shipping line or group is in financial difficulties with a number of creditors pursuing a limited range of assets not every attempt to enforce a claim will succeed nor will every arrest of a vessel give rise to payment or the provision of security for the claim. In those circumstances the unpaid creditor will always seek further assets to attack in pursuit of payment of its claim. South Africa is regarded as a favourable jurisdiction for the purpose of obtaining arrests and the associated ship jurisdiction exposes a broader range of assets to claims. This gives rise to two questions in the context of the associated ship. Firstly, can a claimant arrest both the ship concerned and an associated ship in order to obtain full security for its claim or even for the purpose of instituting actions *in rem* against both the ship concerned and the associated ship in respect of the same claim? Secondly can the claimant, for either purpose, arrest more than one associated ship? These questions in turn raise issues where more than one

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<sup>4</sup> There is no reported case involving an arrest in terms of section 5(2)(d), which provides for property to be re-arrested or further property to be arrested to obtain additional security.



vessel in a fleet of associated ships has been arrested and sold in terms of section 9 of the Act. Is it permissible in those circumstances for claimants to seek payment from more than one fund established pursuant to those sales or is the claimant confined to selecting a particular fund? These broad questions and the issues arising from them have been the subject of very little attention and of one controversial judgment.<sup>5</sup> As that judgment touches on most of the issues relevant to these questions and as such provides a background to those issues it is helpful to outline the facts and the findings before addressing them in greater detail.

## 2 **THE FORTUNE 22**

### (a) **The facts**

The facts giving rise to the litigation were commonplace. A shipyard performed repairs on the mv *Mount Ymitos*. Payment was not forthcoming and negotiations to recover it ensued but only a portion of the amount due was paid. The shipyard commenced proceedings *in rem* against the vessel in Hong Kong and ultimately obtained judgment by default. The vessel had been arrested and sold at a judicial sale but this did not result in any payment to the shipyard. A mortgagee having a prior claim scooped the pool, leaving the shipyard empty-handed. It looked elsewhere to recover payment and not surprisingly thought that the South African associated ship jurisdiction might afford it a remedy as the *Mount Ymitos* was one of a number of vessels owned by ‘one-ship’ companies but under common control. On that basis the *Fortune 22* was arrested as an associated ship in an action *in rem* to recover the balance of the amount outstanding in respect of the repairs. After security had been furnished an application was brought to set aside the deemed arrest of the *Fortune 22*. The application succeeded but this was subject to an appeal.

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<sup>5</sup> *mv Fortune 22: Owners of the m.v. Fortune 22 v Keppel Corp. Limited* 1999 (1) SA 162 (C). This judgment will hereafter be referred to as the *Fortune 22*. Its correctness was challenged in *MV Ivory Tirupati: MV Ivory Tirupati and another v Badan Urusan Logistik (aka BULOG)* 2003 (3) SA 104 (SCA) but the point was not reached.

Unfortunately the matter was settled at the doors of the appeal court so that the original judgment did not receive the consideration of the Supreme Court of Appeal.<sup>6</sup>

The central finding in the judgment was that section 3(6) of the Act precluded the arrest of the vessel because it only permitted the arrest of an associated ship ‘instead of’ the ship concerned and as the ship concerned had already been arrested and sold in Hong Kong there could not be an arrest of an associated ship in South Africa. In reaching this conclusion the court took the view that the wording of section 3(6) in providing that an associated ship could be arrested ‘instead of’ the ship concerned meant that one or the other could be arrested but not both. In other words a claimant was confronted with a choice between a claim against the ship concerned and a claim against one associated ship. It fortified itself in this view by reference to three matters. Firstly it held that this construction was consistent with the provisions of the Arrest Convention. Secondly it held that this was also consistent with English law, which was applicable, according to the judgment, by virtue of the provisions of section 6(1)(a) of the Act. Thirdly it held that this was consistent with the provisions of section 3(8) of the Act which provides that property may not be arrested and security therefor given more than once in respect of the same maritime claim by the same claimant.

Each of these propositions needs to be examined in greater detail. However it is best to start with matters of principle before applying them to the specific situation that arose in that case. In doing so it must be borne in mind that the Act itself contains provisions dealing with multiple arrests. As this was an area of the Act that was clearly influenced by the provisions of the Arrest Convention a consideration of those provisions is helpful before turning to the relevant provisions of the Act.

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<sup>6</sup> The judgment was followed by Hugo J in *The Multidiamond* 2000 SCOSA B 50 (D) but without any discussion of the reasons why it was said to be incorrect or indeed any statement of principle beyond saying that the judge agreed

(b) **The Arrest Convention**

(i) **The Arrest Convention and multiple arrests**

The Arrest Convention was the product of a compromise between civil law jurisdictions that permitted the arrest of any property of a maritime debtor and the English institution of the action *in rem*, where only the ship in respect of which the claim had arisen was susceptible to arrest. The sister ship arrest permitted by the Convention was the compromise that was struck between the high contracting parties. Article 3(1) of the Convention provided that:-

‘Subject to the provisions of paragraph 4 of this Article 4 and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1(1)(o), (p) or (q).’

The effect of this was that in the United Kingdom and countries sharing its admiralty jurisdiction that adopted the Convention a claimant was no longer confined to arresting the ship in respect of which the claim had arisen. In civil law jurisdictions they would be confined to arresting one-ship only<sup>7</sup> and the list of maritime claims was defined. This led Lord Denning MR to summarise the position as follows:-

‘In 1952 there was an international convention held at Brussels. It was held because of the different rules of law of different countries about the arrest of sea-going ships. Some countries, like England, did not permit the arrest of any ship except the offending ship herself; whereas many continental countries permitted the arrest, not only of the offending ship, but also of any other ship belonging to the same owner. In the result a middle way was found. It was agreed that *one-ship* might be arrested, but only *one*. It

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with the earlier decision.

<sup>7</sup> Whilst civil law jurisdictions had permitted the arrest of property owned by the debtor other than the ship in respect of which the claim had arisen it is not clear to what extent it was permissible to have multiple arrests of the same property. Prof Berlingieri does not identify this as a problem in his work *Berlingieri on Arrest of Ships* (4<sup>th</sup> Ed, 2006) and there is no indication that the provisions of the Convention involved any great sacrifice by civil law jurisdictions as opposed to an extension of the English jurisdiction *in rem*. The more important point from the perspective of civil law jurisdictions was probably the fact that agreement was reached on the list of claims giving rise to an arrest.

might *either* be the offending ship herself *or* any other ship belonging to the same owner; but not more. This was an advantage to plaintiffs in England because it often happened previously that, after a collision, the offending ship sank or did not come to these shores. So there was nothing to arrest. Under the Convention the plaintiff could arrest any other ship belonging to the same owner whenever it happened to come to England.’<sup>8</sup>

This statement was undoubtedly correct in the situation confronting the court in that case, where the plaintiff had not only issued summons against an entire fleet of seven vessels in common ownership, but had caused five of them to be arrested simultaneously. It is, however, subject to certain qualifications that emerge from a consideration of Article 3(1) together with Article 3(3), which reads as follows:-

‘A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the court or other appropriate judicial authority of that State, unless the claimant can satisfy the court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is good cause for maintaining that arrest.’

Whilst this Article undoubtedly supports the conclusion in *The Banco* it is by no means correct to say that under the Convention only one arrest is permissible, even if the arrest has been lifted and no security has been furnished for the claim. As Professor Berlingieri points out<sup>9</sup> the English text is unfortunate in that it suggests that two alternatives are considered namely the arrest of a ship or the provision of bail or security. However, the French text uses the conjunction ‘et’ (‘and’) which makes it clear that it is only where the ship has been arrested and either remains under arrest or has been released against the provision of security, that a second arrest is prohibited. An examination of the *Travaux Préparatoires* makes it clear that the French text accurately conveys

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<sup>8</sup> *The Banco: Owners of the motor vessel Monte Ulia v Owners of the ships Banco and others* [1971] 1 All ER 524 (PDA and CA) 532a-c.

<sup>9</sup> *Berlingieri on Arrest of Ships* (4<sup>th</sup> Ed, 2006), paras. 52.516 and 52.517, 195.

the intentions of the delegates and that Professor Berlingieri is correct in saying that from this material:-

‘...it clearly appears that the provision of the bail or other security was the reason for which it was considered that a second arrest should not normally be permitted.’<sup>10</sup>

Although in the first instance therefore the Arrest Convention requires the claimant to choose one-ship in common ownership as the target of arrest, if that arrest is released without security being given the Convention does not bar a further arrest in respect of the same claim.

Article 3(3) provides a further exception to the principle that there should be only one arrest. It qualifies the obligation on the domestic court to order the release of a second vessel from arrest in that the claimant is entitled to satisfy the court or other appropriate judicial authority that there is good cause for maintaining the arrest. The delegates to the Naples Conference where the text of this Article was approved refrained from attempting to define what constituted good cause for maintaining the arrest and left this to domestic courts to decide. There may well have been significant differences of opinion as to what would constitute good cause. Thus in proposing the amendment the French Maritime Law Association postulated the possibility of existing security being insufficient or the currency in which it had been furnished suffering a sudden depreciation, whilst the British delegation took the view that depreciation of the currency would not be considered by English courts as a good reason for sustaining a second arrest.<sup>11</sup>

It appears therefore that the restrictions on re-arrest in the Arrest Convention were imposed on the basis that once an arrest had been effected and either the vessel remained under arrest or security had been furnished it would be inappropriate and possibly oppressive to permit a further arrest, save in special circumstances. It is unclear why the delegates were not concerned with the

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<sup>10</sup> Berlingieri *op cit*, para. 52.519, 195.

<sup>11</sup> Berlingieri, *op cit*. 194, footnotes 2 to 4. The French delegates may ultimately have accepted that the mere insufficiency of the security originally provided would not itself constitute good cause.

problem of the security furnished to a claimant being insufficient to meet the claim if successful. It is possible that the answer lies in the practical circumstance that the effect of the arrest and the furnishing of security would be to establish the court's jurisdiction and that a judgment would follow that would ordinarily be enforceable against the owner of the arrested vessel. In civil law jurisdictions the proceedings would be against the owner so that if the judgment could not be satisfied from the security furnished it would be open to the creditor to enforce that judgment in any other jurisdiction where the owner possessed assets. Ordinarily that would also be the case in England, which then as now was a major centre of maritime litigation. Whilst proceedings would be taken *in rem*, if the proceedings were opposed by the owner of the vessel entering appearance and defending the action it was well established that the action would then proceed as an action *in personam* against the owner of the vessel.<sup>12</sup> In any opposed proceedings therefore the judgment obtained by the creditor would be for the full amount of the indebtedness and, if the security proved inadequate, any other assets of the owner could be pursued in satisfaction of that judgment. Accordingly it would only be in the limited situation where the owner did not defend the action and perhaps also in the case of some claims under maritime liens where the action *in rem* was pursued after a change in ownership of the vessel, that a party obtaining inadequate security would be left remediless, with a judgment that could not be enforced by other means. Of course insolvency of the debtor or other reasons rendering the judgment unenforceable could still exist but it does not appear that this was an issue in the forefront of the minds of the delegates.

A last point of significance about this provision of the Convention is that whilst its provisions apply to the re-arrest of a ship (or the arrest of a sister ship after an initial arrest and the provision of security) in the country where the original arrest took place it is of substantially greater importance in preventing a further arrest in another state that has acceded to the Convention. This is a significant advantage for shipowners in that in contracting states it means that, subject to a narrow and ill-defined exception, they are not at risk of having their vessels subjected to multiple arrests by the same creditor in respect of the same maritime claim. Re-

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<sup>12</sup> *The Dictator* [1892] P304, 7 Asp MLC 251; *The Gemma* [1899] P285 (CA) 291, 8 Asp MLC 585; *The Duplex* [1912] P8, 12 Asp MLC 122. This may be subject to the qualification that the owner is personally liable for the

arrest was impermissible in England and it is unclear to what extent it would have been permitted in civil law jurisdictions. It seems improbable that in any of them it would have been permissible or possible to obtain a second arrest when full security had already been furnished for the claim. Procedural remedies by which courts regulate their own process, such as the plea of *lis pendens* or the exercise of a jurisdiction to prevent an abuse of process, would have been available to prevent that from happening.

A consideration of these provisions of the Arrest Convention reveals that the concerns of the delegates to the various conferences leading up to the adoption of the Convention were markedly different from those that were present at the time the Admiralty Jurisdiction Regulation Act was under consideration and the associated ship arrest provisions were introduced. The history of the Arrest Convention indicates that like other conventions having their origins in the work of the Comité Maritime International the concern was to secure uniformity in regard to the customs and practices of the major maritime nations. Prior to the Convention different systems had prevailed in different countries regarding the entitlement to arrest vessels. The whole purpose of the protracted history leading up to the adoption of the Convention in 1952 was to bring about uniformity in this regard. In turn that had the desirable goal of providing certainty to those involved in maritime trade as to the scope of the remedies available to courts in major maritime nations and the risks attendant upon participation in that trade. That is a far cry from the particular and considerably narrower concern underpinning the associated ship jurisdiction, which was the ability to make use of corporate personality in the form of ‘one-ship’ companies in order to avoid liability for legitimate debts. At the time the Convention was negotiated and agreed it is unclear whether this was thought to be a major problem as the bulk of world shipping was still undertaken by major shipping lines that had not as yet adopted the one-ship company as their preferred corporate form. That had changed dramatically by the time the Act was being drafted and in the result the target of the associated ship jurisdiction is the evasive or recalcitrant debtor, not international uniformity in arrest regimes in different maritime nations. In considering

the impact of the Arrest Convention on the provisions of the South African statute this distinction should be borne in mind.

(ii) **The position in South Africa prior to the Act**

Prior to the inception of the Act it was impermissible, whether proceedings were taken before the court in the exercise of its admiralty jurisdiction or in the exercise of its parochial jurisdiction, to arrest a vessel a second time after an initial arrest or attachment and the release of the vessel against the provision of security. As the reasons for this were different depending upon which jurisdiction had been invoked each must be considered separately.

When the court was exercising its admiralty jurisdiction the position was the same as in England. Once a vessel had been arrested in an action *in rem* it could be released against the provision of bail or some other form of security.<sup>13</sup> The effect of a vessel being released from arrest against the provision of bail was that no further arrest of the vessel was permissible. Dr. Lushington set out the position as follows:-

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<sup>13</sup> There was a distinction between the giving of bail, where the security was furnished to the court, and the giving of security in some other form, which is purely a contractual matter. *The Christiansborg* (1885) 10 PD 141 (CA) 152, 154 and 155-6. The usual form in which security was given in South African practice prior to the Act was by way of a letter of undertaking from or on behalf of a P&I Club. The language of s 3(10)(a)(i) in using the expression 'security or an undertaking' appeared to refer to the historic distinction between bail and a private contractual undertaking whereby security was furnished. This is reinforced by reference to the draft bills accompanying the 1979 and 1980 memoranda, the first of which referred simply to 'bail' and the second to 'bail or security'. The word 'bail' was then deleted apparently, according to Mr. Shaw, because certain members of the Law Commission were of the view that it could only be used in a criminal law context. Thereafter the word 'undertaking' was added. However in: *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA), paras.7 and 8 the court rejected this distinction and held that the reference to 'undertakings' must be restricted to undertakings which do not constitute personal security, such as an undertaking to give a bail or undertakings in relation to the vessel, such as that it not be removed from the jurisdiction or that it return to the jurisdiction at specified intervals or that the vessel will be kept maintained and insured. It is doubtful whether this is what was intended when the legislation was drafted or that it was ever intended that Courts could adjudicate on the terms of security and direct that vessels be released against security, which remains contractual in nature, to which the arresting party has not agreed.



‘... now the bail given for a ship in an action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action.’<sup>14</sup>

Even if the security was furnished by means of a personal undertaking, rather than by providing bail the effect was the same. The vessel could not be arrested again in respect of the same claim.

Where a ship was attached *ad fundandam et confirmandam jurisdictionem* the attachment served a dual purpose. It served both to establish the jurisdiction of the court and to provide the claimant with property or security in South Africa against which any judgment could in due course be executed.<sup>15</sup> Whilst an attachment is effective for the first purpose even though the value of the asset attached is significantly less than the amount of the claim<sup>16</sup> if the defendant wishes to secure the release of their property attached it does not suffice for it to tender security to the extent of the value of that property. The authorities are clear in saying that what is required is security to satisfy the judgment and not merely security to stand and abide by the judgment.<sup>17</sup> Accordingly in the case of an attachment *ad fundandam et confirmandam jurisdictionem* the position would always be either that the attachment was still in place or that security for the claim had been furnished. In view of the dual function of the attachment as establishing the court’s jurisdiction no further attachment would be permissible. Jurisdiction was already established and

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<sup>14</sup> *The Wild Ranger* (1863) B&L 84. The point has been emphasised many times. See *The Joannis Vatis* (No 2) [1922] P213; 16 Asp Mar Cas 13; *The Point Breeze* [1928] P135; 30 Ll L Rep 229 and *The ‘Daien Maru’* No. 18 [1986] 1 Lloyds Rep. 387.

<sup>15</sup> *MT Argun: Sheriff of Cape Town v MT Argun her owners and all persons interested in her and others; Sheriff of Cape Town and Another v MT Argun, her owners and all persons interested in her and another* 2001 (3) SA 1230 (SCA) 1244E-F; *Naylor and another v Jansen; Jansen v Naylor and others* 2006 (3) SA 546 (SCA) para. [26], 559.

<sup>16</sup> *Thermo Radiant Oven Sales (Pty) Limited v Nelspruit Bakeries (Pty) Limited* 1969 (2) SA 295 (A) 309-310.

<sup>17</sup> *Yorigami Maritime Construction Company Limited v Nissho-Iwai Co Limited* 1977 (4) SA 682 (C) 697H-698I.

once established the entitlement to attach property *ad fundandam et confirmandam jurisdictionem* falls away.<sup>18</sup>

In the result the position prior to 1983 and the enactment of the Act was that where a vessel had been arrested in an action *in rem* or attached *ad fundandam et confirmandam jurisdictionem* no situation could arise in which a second arrest or attachment would be permissible. Either the original arrest or attachment would still be in place, thereby precluding a further arrest or attachment, or bail or security would have been furnished. Once bail or security was furnished and whether in admiralty or in the parochial jurisdiction no further entitlement to arrest or attachment could arise.

As was the case with the Arrest Convention this situation was unrelated to the then non-existent associated ship arrest jurisdiction and the underlying reasons for it were unrelated to the factors that led to the introduction of that jurisdiction. That being so it is impermissible and frankly misleading to extrapolate from the position as it was prior to the Act coming into operation and prior to the introduction of the associated ship arrest, in order to determine the intention of the legislature in regard to multiple arrests after that jurisdiction had come into existence. One cannot project forward onto a novel institution clearly intended to break with the past the restrictions that formerly applied to its predecessor. Nor can one use the past position to identify a supposed mischief that the later statutory provisions could be directed at remedying.

(c) **The Act and multiple arrests**

(i) **Section 3(8)**

The Act contains two provisions that are directed specifically at the possibility of multiple arrests. Firstly there is section 3(8) which provides that:-

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<sup>18</sup> The position is the same as that which prevails where the *peregrinus* has consented to jurisdiction prior to an attachment being made. In that event no attachment is permissible. *Jamieson v Sabingo* 2002 (4) SA 49 (SCA).

‘Property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant.’

That provision is in turn subject to an exception embodied in section 5(2)(d) which provides that a court may in the exercise of its admiralty jurisdiction:-

‘... notwithstanding the provisions of section 3(8), order that, in addition to property already arrested or attached, further property be arrested or attached in order to provide additional security for any claim, and order that any security given be increased, reduced or discharged, subject to such conditions as to the court appears just.’<sup>19</sup>

That the wording of section 3(8) was adapted from the provisions of Article 3(3) of the Arrest Convention is undoubtedly correct. However, in the course of adaptation to fit the very different circumstances of the jurisdiction to be conferred on South African courts by the Act material changes were effected that bear directly upon the question of multiple arrests in relation to associated ships. In addition the context in which the provision falls to be construed is very different from anything that the Arrest Convention was concerned to address.

Section 3(8) refers generally to the arrest of property because, in terms of section 3(5) of the Act it is permissible to arrest not only the ship, but also its equipment, furniture stores or bunkers, the whole or any part of the cargo, the freight, a container where the claim arises out of or relates to use of that container and a fund in court arising out of the sale of the vessel in terms of section 9. As the Arrest Convention is concerned only with the arrest of ships it is not

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<sup>19</sup> S5(2)(d) originally empowered the court to:-

‘Order that any security given be increased, reduced or discharged subject to such conditions as to the court appears just and, for the purpose of an increase of security, authorise the arrest of property notwithstanding the provisions of section 3(8).’

In its original form the section clearly permitted an additional arrest for the purpose of obtaining an increase in security and the amended language merely makes it clear that the power is available not only in the case of an arrest but also in the case of an attachment. No judicial consideration was given to the section as originally worded and it suffices for present purposes to look only at the amended version.

concerned with the other types of property that are capable of being arrested in order to commence an action *in rem* in South Africa. However, for present purposes the broader reach of the South African statute is immaterial and one can read the reference to property as referring to a ship and limit the discussion accordingly.

More importantly the draftsman has avoided the problem occasioned by the difference between the French and English texts by adopting the former and using the conjunction ‘and’. This makes it clear that the prohibition in section 3(8) is only applicable where a vessel has both been arrested and thereafter security has been given to secure its release. An actual arrest is not necessary because in terms of section 3(10)(a)(i) of the Act if security has been given to prevent the arrest of the vessel there is deemed to be an arrest. Accordingly, whether there has been an actual arrest followed by the furnishing of security or the furnishing of security accompanied by a deemed arrest, section 3(8) is applicable. However if an arrest is no longer in place and security has not been furnished the section does not pose a bar to a further arrest of the same property. Thus in a case where an initial arrest was set aside on the basis that it had been obtained without the respondent making out a *prima facie* case in respect of the causes of action on which it relied for that arrest, it was held that a second arrest was permissible.<sup>20</sup>

A more difficult situation arises where security is furnished to secure the release of the vessel, but subject to a reservation of the defendant’s right to apply to court to have the original arrest, or deemed arrest, set aside. If that application is successful the claimant will be left with neither an arrest nor security. However, until the arrest or deemed arrest is set aside the claimant’s situation was that the ship had been arrested and security therefor had been given. Does the setting aside of that arrest mean that the elements of the statutory prohibition fall away so that the claimant is entitled to seek a further arrest if it is able thereafter to remedy the original defect in its case, for example, by obtaining sufficient evidence to show that it has a *prima facie* case in respect of the cause of action? It is submitted that the answer must be in the affirmative. The reason for the prohibition on the duplication of arrests and the provision of security is that,

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<sup>20</sup> *Great River Shipping Inc v Sunnyface Marine Limited* 1992 (2) SA 87 (C).

save in the circumstances provided in section 5(2)(d), a further arrest where one has already taken place and security has been furnished would be oppressive. Where that arrest was set aside as lacking a proper legal foundation so that the claimant has neither an arrest nor security, the underlying reason for the prohibition in section 3(8) is absent.

One can arrive at the same conclusion by a slightly different route. It can be said that as a matter of construction of the section security is not being 'given more than once' where no security is in existence. In other words it is a necessary implication of the section that the prohibition contained therein only operates when the claimant is in possession of valid security given in respect of the maritime claim and to secure the release from arrest (or that no arrest would take place) of the vessel. Accordingly it is submitted that in a situation where security has been given, but the arrest or deemed arrest underpinning that security is set aside, with the result that the security is void, a further arrest of the same vessel is permitted.

The other elements of section 3(8) appear on the face of matters to be relatively straightforward. The section applies only where the second arrest is by the same claimant. The latter should not ordinarily occasion difficulty because the existence of a claim is inextricably linked to the identity of the claimant.<sup>21</sup> Accordingly the claim and the claimant will ordinarily go together. However there are some situations where this is not the case. Thus if the claimant is a company and it has been placed in liquidation or for some other reason the original claimant is replaced by someone representing them, such as a trustee or executor, is the claimant for the purposes of section 3(8) the same claimant? Then there is the case of a cession of a claim to a third party. Patently the claim is the same but the identity of the claimant is different. Can section 3(8) be invoked in that situation? These are not easy questions to answer. A tentative response to the first is that in any situation where there is an identity of interest between the original claimant

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<sup>21</sup> As Van Heerden J put it in *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1988 (4) SA 63 (D) 68A-B; 'Every action has to have a plaintiff and it is the plaintiff that has to have title to bring a particular action and not the other way about; it is not the action that has to have title to a particular plaintiff. A court does not first decide whether there is a cause of action and, if there is, start looking for a plaintiff. The issue a court is called upon to decide is that between the parties before it and there can only be such an issue if it has properly been brought by a plaintiff who has to bring that particular kind of claim against a defendant who can legally be held liable in respect thereof.'

and the subsequent claimant - as in the case of a liquidator or a trustee or executor - they should be treated as being the same claimant for the purposes of the section. The case of the cessionary is more difficult and it may be more appropriately dealt with on the basis that a further arrest at the instance of the cessionary would be an abuse of process. However these are hypothetical situations<sup>22</sup> so it may be preferable to leave the question until it arises in a concrete situation. As shown below the scope of application of section 3(8) is relatively limited so this question may never arise.

As with the requirement that it be the same claimant, ordinarily whether the claim is the same claim will not give rise to difficulties. However one question that does arise is whether a claim based upon a judgment or an arbitration award is the same as the underlying claim so as to prevent a second arrest by virtue of section 3(8). The point arose in the context of a claim against a vessel called the *Amer Prabha*. She had been arrested in Singapore and released against the provision of security for proceedings in Hong Kong. Those proceedings had resulted in a judgment in favour of the claimant but the party furnishing the security had gone into provisional liquidation so that the judgment was not satisfied. The claimant then arrested the *Ivory Tirupati* as an associated ship in proceedings to enforce its judgment. An application was brought to set the arrest aside *inter alia* on the grounds that the arrest was prohibited by the provisions of section 3(8).

The basis for the application was the contention that the effect of the judgment obtained in Hong Kong was simply to confirm or strengthen the original underlying claim by way of what is known in South African law as a *novatio necessaria*<sup>23</sup>, which is not a true novation replacing the existing contract with another, but a means of strengthening and not supporting existing rights. Accordingly, so it was argued, the claim in respect of which the *Ivory Tirupati* had been arrested was the same claim as that brought in the courts of Hong Kong against the *Amer Prabha*. It

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<sup>22</sup> Prior to the Act cessions were used in South Africa to try and circumvent the limitations of the attachment *ad fundandam et confirmandam jurisdictionem*.

<sup>23</sup> *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) and *Swadif (Pty) Ltd v Dyke* NO 1978 (1) SA 928 (A)

followed according to the argument that this was a case falling within section 3(8). Of course, in order to sustain the argument it was necessary for the court to uphold the contention that a claim on a judgment is the same claim as the original underlying claim in respect of which the judgment had been given. Absent that foundation the entire argument was doomed to fail.

In the court below the argument was rejected on the simple basis that in terms of the Act the original claim, a simple cargo claim, is a different maritime claim from the claim on the judgment. They fell under different sub-paragraphs of the definition of a maritime claim<sup>24</sup> and this ‘presupposed’ that they were different claims.<sup>25</sup> On appeal<sup>26</sup> it was correctly held that this approach led to anomalies in that there were other claims that could properly fall under two or more heads of maritime claim as defined in section 1 of the Act and it would be incorrect to say that this meant that there was more than one claim. That is undoubtedly so in the application of section 3(8). The court is there concerned with the nature of the claim rather than its precise characterisation as a particular maritime claim under the Act. However, it is not clear that the court *a quo* had been guilty of the overly simplistic approach attributed to it on appeal. Immediately before referring to the definition of a maritime claim the court had referred to the judgment of the Supreme Court of Appeal in which it had held that an arbitration award was a claim in its own right in terms of the Act.<sup>27</sup> Be that as it may the appeal court then moved on to look at the nature of the claim and held that a judgment or arbitration award not only reinforces and strengthens the original claim by proclaiming its validity, but also creates a new obligation as well. Whilst it is correct therefore to say that a judgment or arbitration award strengthens the original debt it also creates a new and independent debt capable of being sued upon in its own

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<sup>24</sup> Sub-paragraphs (g) and (aa) respectively. Whilst this case dealt with a judgment it is equally applicable in the case of an arbitration award.

<sup>25</sup> *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* 2002 (2) SA 407 (C)

<sup>26</sup> *MV Ivory Tirupati: MV Ivory Tirupati and another v Badan Urusan Logistik (aka BULOG)* 2003 (3) SA 104 (SCA).

<sup>27</sup> *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA) 650I-651B

right by virtue of a different and separate cause of action. This point the court illustrated by reference to the different matters that would have to be proved in order to pursue a claim on a judgment as opposed to those that would have to be proved in an action on the original cause of indebtedness. It followed that the claim being sued upon was not the same claim as the original claim and section 3(8) accordingly did not apply.<sup>28</sup>

It follows from this that in interpreting and applying section 3(8) it is important to examine the underlying nature of the maritime claim rather than its pigeonhole within the various classes of claims that are designated as maritime claims in section 1 of the Act. In other words it is ‘the matter in issue’ rather than the cause of action that is relevant<sup>29</sup>. For these purposes however a claim on a judgment or arbitration award is a different claim from the claim on the underlying indebtedness itself.

(ii) **The territorial scope of section 3(8)**

The most significant difference between section 3(8) of the Act and Article 3(3) of the Arrest Convention lies in their respective territorial scope. The prohibition in Article 3(3) prohibits multiple arrests and the furnishing of security more than once ‘in any one or more of the jurisdictions of any of the Contracting States’. Its operation therefore extends beyond the territorial limits of any particular State to all Contracting States. Conversely the prohibition has no operation in relation to arrests and the furnishing of security in states that are not Contracting States. In other words there is nothing in Article 3(3) to prevent the arrest of a vessel in both France, which is a Contracting State, and in South Africa or the United States of America, which

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<sup>28</sup> It appears from the facts of the *Fortune 22* that the action *in rem* was based on the original claim for payment for repairs and not on the judgment obtained by default in Hong Kong. Had it been the latter then section 3(8) would not have applied in that case to preclude the South African arrest. Also as the maritime claim was different it could not have been said that the ship concerned had already been arrested on the same claim. However there would then have been a problem in establishing the association as the claim on the judgment arose after the vessel had been sold in execution.

<sup>29</sup> *MV Silvergate; Tradax Ocean Transport SA v MV Silvergate properly described as mv Astyanax and others* 1999 (4) SA 405 (SCA) para [54].



are not Contracting States. There is nothing in the Arrest Convention that suggests that the rule of comity that is extended to States that are parties to the Convention extends to States that are not. If there is to be a prohibition in any Contracting State on arrests in that State in consequence of an arrest in a non-Contracting State, that prohibition must flow from a rule of domestic law, not from the provisions of the Arrest Convention.<sup>30</sup>

Section 3(8) is likewise subject to territorial limitation but the limitation is even narrower than those under the Arrest Convention. In the absence of any indication to the contrary the limitation is that it is only concerned with the arrest of property in South Africa in terms of the Act and the giving of security for that property. The starting point is the general principle that in the interpretation of statutes legislation is presumed not to have extra-territorial application.<sup>31</sup> An examination of the language of section 3(8) does not suggest that it is in any way concerned with arrests in any country other than South Africa. An important point is that it is concerned with the arrest of 'property' and section 3(5), has itself set out what property is subject to arrest in terms of the Act. That seems a clear indication that the arrest of property to which section 3(8) is directed is an arrest of property under section 3(5) of the Act. That is perhaps reinforced by the fact that the property that can be arrested in South Africa under section 3(5) is not limited in the same way as the property subject to arrest under the Arrest Convention.

The context of section 3(8) does not suggest that it is intended to have any application other than to arrests and the furnishing of security in South Africa. It is part of section 3 of the Act that deals with the form of proceedings. It follows upon section 3(5), which provides that an action *in rem* shall be instituted by the arrest within the area of jurisdiction of the court concerned of property in respect of which the claim lies. Then in section 3(6) it is said that an associated ship may be arrested instead of the ship in respect of which the maritime claim arose, and section 3(7)

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<sup>30</sup> Certain countries that are parties to the Arrest Convention such as Portugal and Sweden do not limit the property or the claims that may give rise to an arrest when dealing with non-Convention vessels. See the country entries in *Maritime Law Handbook* (Kluwer in co-operation with the International Bar Association)

<sup>31</sup> *Chancellor, Masters and Scholars of the University of Oxford v Commissioner for Inland Revenue* 1996 (1) SA 1196 (A) at 1205-1205; *American Natural Soda Corporation and Another v Competition Commission and others* 2003 (5) SA 633 (CAC), para. 17, p645.

sets out what an associated ship is. When it is provided in the immediately following subsection that property shall not be arrested and security therefor shall not be given more than once the ordinary connotation is that this is dealing with arrests of the character set out in the immediately preceding subsections. There is no indication whatsoever that it is concerned with either prior or subsequent arrests in foreign jurisdictions of which no mention is made in any section of the Act.

Nor is there any reason why section 3(8) should have any application in relation to arrests in jurisdictions other than South Africa. The essence of the prohibition in Article 3(3) of the Arrest Convention is the international comity that exists between the Contracting States. The purpose of the Convention is to provide a uniform arrest regime in those countries that adhere to the Convention. Part and parcel of that Convention is the principle that, in general, only one arrest will be permitted where security is furnished to the claimant (and whilst the property is still under arrest no further arrest would be possible). However, this rationale clearly has no application in relation to the domestic statute of a country that is not, and could not be, a party to the Arrest Convention. The reciprocity that underpins this provision of the Arrest Convention is then absent. Why should one country prohibit the arrest of a vessel in its jurisdiction in accordance with its domestic law, merely because the vessel has already been arrested in another country, without the other country being under any obligation to reciprocate? No apparent reason presents itself especially as reciprocity can be achieved if so desired by the mechanism of acceding to the Arrest Convention. A French or German court would not refuse an arrest of a vessel in accordance with their domestic law merely because it had previously been arrested in South Africa. Why should the converse not hold true?

It is accordingly submitted that on a proper interpretation of section 3(8) it relates only to the arrest of property in South Africa under the provisions of sections 3(5) and (6) of the Act.<sup>32</sup> Unlike the provisions of the Arrest Convention therefore section 3(8) does not have any extra-

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<sup>32</sup> There is an argument that the reference to property being arrested in section 3(8) must be construed as including an attachment *ad fundandam et confirmandam jurisdictionem*. Some force attaches to that argument by virtue of the current language of section 5(2)(d) of the Act. However, as the subject matter of consideration in this work is the associated ship it is unnecessary to explore this any further.

territorial application. It is neither concerned to prohibit arrests and the furnishing of security in jurisdictions outside South Africa nor is it directed at prohibiting arrests in South Africa where an arrest has taken place in another country. There are of course various circumstances in which an arrest in South Africa could be challenged in consequence of proceedings elsewhere. For example, if the claimant already held adequate security for its claim in another jurisdiction arising out of an arrest in that jurisdiction that would on its own be sufficient reason to refuse an arrest in terms of section 5(3) of the Act.<sup>33</sup> Then in terms of section 7(1)(a) of the Act the court may decline to exercise its jurisdiction or it could, in terms of section 7(1)(b) of the Act, stay any proceedings in South Africa. Alternatively it could exercise its powers in terms of section 5(2)(c) of the Act to order that any arrest in South Africa be subject to the condition that the security already held by the claimant be released or discharged upon security being furnished for the proceedings in South Africa. It is apparent therefore that there are ample remedies in the Act for any abusive exercise of the power of arrest. It is accordingly submitted that section 3(8) can properly be confined to arrests in South Africa in terms of sections 3(5) and (6) of the Act.<sup>34</sup>

This view of the position differs from that reached in regard to section 3(8) in the *Fortune 22*. Thring J expressed his conclusion as follows:

‘I am unable to agree with Mr Hazell that the Legislature could have intended s 3(8) of the Act to have been of only local application; in the sense that it could have envisaged and countenanced a second arrest of property in South Africa which had already been arrested, and replaced by security, in a foreign jurisdiction.’<sup>35</sup>

Leaving aside the fact that in the case before the court the claimant had not obtained security in the foreign jurisdiction and the reason for the arrest of an associated ship in South Africa was that

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<sup>33</sup> *Cargo Laden and Lately Laden on Board the m.v ‘Thalassini Avgi’ v mv ‘Dimitris’* 1989 (3) SA 820 (A); *Bocimar M.V v. Kotor Overseas Shipping Limited* 1994 (2) SA 563 (A).

<sup>34</sup> For this reason alone the judgment in the *Fortune 22* is clearly wrong as it prohibited an arrest in South Africa on the grounds that there had been a prior arrest in Hong Kong although no security had been given to secure the release of the vessel.

<sup>35</sup> 166F-G

the earlier proceedings in Hong Kong had proved fruitless, the starting point is incorrect. It is not a question of determining whether the legislature intended a law to be of local application, but whether the legislation should for any reason be construed as being intended to apply to events occurring extra-territorially. As already mentioned no foreign court would prohibit an arrest in its jurisdiction because of a prior arrest in South Africa. It is unclear in those circumstances why it should have been thought that the South African legislature would have wished to take such a benevolent approach to arrests in other countries with which we have no reciprocity.

If one tries to discern the underlying reason for the view that the section should not be confined to prior arrests in South Africa it appears to lie in the following passage:

‘Proceedings *in rem* are often international in their operation and effect in the sense that it frequently happens, as indeed has happened here, that *peregrini* find themselves litigating with one another in foreign Courts. Such litigation is, by its very nature, subject to less in the way of territorial restrictions than is municipal litigation. Why, then, would our Legislature don blinkers, as it were, and confine itself in enacting s 3(6) of the Act entirely to arrests within the jurisdiction of a South African Court? Our common law recognizes foreign judgments, subject to certain requirements ... Why, then, would the Legislature wish to close its eyes to foreign arrests? I can think of no good reason. I interpose here that it is not suggested by the respondent that the arrest of the *Mount Ymitos* in Hong Kong was in any way irregular or invalid, nor that the default judgment taken out there by the respondent is open to attack of any kind. These actions appear, on the face of it, to have been regularly and validly executed.’<sup>36</sup>

Whilst the judge was here speaking of section 3(6) he made it clear that the same reasoning applied to section 3(8). With respect it is unclear why the fact that South Africa, like most states, recognises foreign judgments, which after all are a specific category of claim in terms of the Act, should mean that a South African statute dealing with proceedings in this country and the entitlement to arrest a ship in South Africa, should be construed as applying to foreign arrests. A judgment from a court of competent jurisdiction affirms the validity of a claim thereby rendering it unnecessary for another court to investigate it on the merits. The recognition of foreign judgments is based on comity and on the need for finality in litigation. Neither of these bears

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<sup>36</sup> At 165H-166B.

upon an arrest in a foreign state that is relevant only to questions of the jurisdiction of that court and security for claims.

Other than where security has already been furnished, where there are other remedies available to prevent oppressive behaviour, the fact that there has been an arrest in a foreign country is ordinarily irrelevant to the question whether an arrest should be permitted in this country. In that situation the issue should revolve around questions of convenience of the conduct of litigation rather than an arrest that may have no practical benefit for the arresting party.<sup>37</sup> Why should a South African court refuse to exercise its undoubted jurisdiction merely because of the existence of proceedings between the same parties over the same claim in a different jurisdiction? At common law, both here and elsewhere, this is the subject of the plea of *lis alibi pendens*. In South Africa it has never been the position that the mere existence of foreign proceedings should result in an automatic stay of local proceedings and there are no reasons of policy why this should necessarily and inevitably be the case. A more appropriate response is to leave such questions to be dealt with in the court's discretion having regard to the respective interests of the parties and whether the further proceedings in South Africa are vexatious or oppressive<sup>38</sup>. It is always open to the court to impose conditions on its order, such as a requirement that the foreign proceedings be stayed, to prevent any abuse. Nor does the international character of the proceedings alter this. Legal rules such as those that govern the plea of *lis alibi pendens* are specifically applicable to international litigation and probably find greater purchase in that situation than in regard to conflicting domestic litigation.

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<sup>37</sup> In the *Fortune 22* there had been an arrest in Hong Kong and the vessel had been sold but the entire proceeds of the sale had been taken by a mortgagee whose claim ranked prior to that of the shipyard that was the claimant in that case.

<sup>38</sup> In *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) 138 the following was said: 'It is clear on the authorities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject-matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist ...

Additionally no good reason exists why section 3(8) should be given this interpretation. It is not, as the judge thought, a case of the legislature donning blinkers and ignoring arrests in foreign jurisdictions. There can be no doubt that those who drafted the statute were aware of that possibility. A more pertinent question would be to ask why the legislature would think it necessary to override the common law defence of *lis alibi pendens* by an outright prohibition on an arrest in South Africa if there had been a prior arrest elsewhere, irrespective of where the arrest had taken place and irrespective of the results of that litigation<sup>39</sup>. The reasons that underpin the related provision in the Arrest Convention are not applicable in relation to a country that is not a party to that convention. It is an odd conclusion that the legislature introduced as radical a procedure as the associated ship arrest whilst silently and by inference abolishing a long-standing and uncontroversial means of dealing with duplication of proceedings in different jurisdictions. Nowhere in the Law Commission report is it suggested that this was what those responsible for drafting the Act had in mind.

One final point is that section 3(8) only deals with arrests and not attachments. In at least some instances therefore it would be possible for the claimant to attach the ship - either the ship concerned or a true sister ship - and to commence proceedings *in personam* against the owner in South Africa.<sup>40</sup> There is no apparent reason why this should be permitted but not the commencement of proceedings *in rem*. Overall the reasons given by Thring J for holding that section 3(8) did not permit an arrest in South Africa if there had already been an arrest in some other jurisdiction are unfounded and unpersuasive. On this point it is submitted that the *Fortune 22* was incorrectly decided and the result should have been different. That does not however mean that the other point of principle decided in the case, which is of fundamental importance to associated ship arrests, can be ignored and it will be dealt with after completing the consideration of section 3(8).

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<sup>39</sup> For example the arrest might have taken place in a jurisdiction where shortly afterwards there was an outbreak of hostilities or an internal uprising rendering the courts ineffective or inaccessible. The effect of the judgment is that even in a case where South Africa is the most appropriate jurisdiction to conduct the litigation it is impossible to commence it.

(iii) **Section 3(8) and subsequent arrests**

The other major point of difference between Article 3.3 and section 3(8) and the last point of difficulty in regard to the interpretation of section 3(8) is whether the section applies to any subsequent arrest of any property or whether the section is specific and relates only to the re-arrest of property that has already been arrested by way of an actual arrest or is subject to a deemed arrest and for which security has been provided. In Article 3(3) of the Arrest Convention it is expressly spelled out that the prohibition on a subsequent arrest applies not only to the ship that was the subject of the original arrest but also to ‘any ship in the same ownership’. In other words if the ship in respect of which the claim arose has been arrested in any Contracting State neither that ship nor any sister ship may be arrested in any other Contracting State. Similarly if the first vessel arrested is a sister ship of the ship in respect of which the maritime claim arose then not only can that ship not be arrested again but no other sister ship, including the ship in respect of which the maritime claim arose, is susceptible to arrest in a Contracting State or indeed in the country where the initial arrest was effected.

Not only does section 3(8) not contain any specific provision that would preclude arrest of other property, apart from that which has already been the subject of an arrest, but the inclusion of the word ‘therefor’ brings about a significant change in the meaning of the language used. There is a substantial difference between saying:-

‘Property shall not be arrested and security **therefor** shall not be given more than once in respect of the same maritime claim by the same claimant’

and saying:-

‘Property shall not be arrested and security shall not be given more than once in respect of the same maritime claim by the same claimant.’<sup>41</sup>

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<sup>40</sup> Shaw, *op cit*, 47 mentions this possibility although there are arguments that s 3(8) includes attachments.

<sup>41</sup> The Afrikaans text, which is the signed version, has the expression ‘sekerheid daarvoor’.

The inclusion of the word ‘therefor’ means that the provision of security relates back to the specific property that has been arrested or has been the subject of a threat of arrest. In other words the furnishing of security is linked not only to the claim but also to the specific property that is the subject of the arrest or deemed arrest. This is not the case if the word ‘therefor’ is omitted. In that event the furnishing of security, whilst of course it arises from the arrest or deemed arrest, is linked only to the maritime claim. What would then be prohibited by the clear language of the section would be the furnishing of security more than once in respect of the same claim. However the insertion of the word ‘therefor’ links the provision of security not only to the claim but also to the specific property that is subject to arrest or a deemed arrest..

No assistance is to be obtained from the drafting history of the section. From the outset it followed the wording of section 3(3) with the only alteration during the drafting process being the substitution of ‘property’ for ‘a ship’. The word ‘therefor’ appears for the first time in the draft attached to the Law Commission’s report and the report itself contains no explanation for this, the Commission confining itself to saying<sup>42</sup> that ‘the broad notions upon which the Convention is founded have been preserved’. That general statement is of little assistance in the interpretation of a specific provision in the Act.

The language of section 3(8) seems to confine the operation of the section to a re-arrest of the same property and is silent on the possibility of an attachment of one vessel and the arrest of another. However, that then raises the question of the reason for including this section in the Act. The purpose of the parallel provision in the Arrest Convention is clear. There it largely operates to prevent a claimant from harassing a debtor by way of multiple arrests in different jurisdictions. However, the need for such a provision in a single country is debatable. Most developed systems of jurisprudence have a mechanism for preventing the abuse of process and South Africa is no

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<sup>42</sup> In para. 7.3 of its report.



different in this regard.<sup>43</sup> Accordingly any inadequacy in the existing statutory remedies could be dealt with by developing an appropriate procedure for preventing this type of abuse of process. That has led the court in one instance to suggest that section 3(8) cannot be given this construction. However, the statement is by way of an *obiter dictum* and displays a considerable measure of confusion so that it is hardly a safe guide.<sup>44</sup>

In the case in question the claimant alleged claims against both Louis Dreyfus Armateurs SNC (LDA) and an entity known as Takamaka. The claimant had previously threatened to arrest the vessel *La Sierra* and in consequence had obtained a guarantee for its claims against LDA but not against Takamaka. The arrest of the *m.v La Pampa* was sought in order to provide security for the latter claim. The court held that the terms of the original security precluded such an arrest. That disposed of the matter but the court went on to say that the arrest of the *m.v. La Pampa* could be set aside in terms of section 3(8). The judge noted (in para. [41]) that this point had not been seriously argued by the parties but went on to say:-

‘[42] It cannot be disputed that the claimants in this case are the same...claimants, and the claims are the same, as those in the arrest of the *La Sierra*. It is also the same claimants who now sought unlawfully to arrest the *La Pampa*. The implication in this argument is that for contingencies created by s3(8) to be present, the respondent must arrest the same vessel that was previously arrested. This argument, if it is understood properly is, with respect, flawed. It could not have been the intention of the Legislature to prevent the claimants from arresting the same vessel that was arrested but allowed the arrest of a different vessel from the same owner. To allow that, to my mind, would be to negate the intention of the Legislature, which was to prevent the potential claimants from arresting and re-arresting vessels for the same claim even when, as in this case, security has been provided.’

With respect there are a number of difficulties with this passage. Firstly it commences with the premise that the arrest of the *La Pampa* was unlawful. If so it fell to be set aside without resort to section 3(8). Secondly, the *La Sierra* and the *La Pampa* were not owned by the same

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<sup>43</sup> To the extent that there are not sufficient express provisions in the Act to prevent its abuse, section 173 of the Constitution empowers the High Courts to protect and regulate their own process taking into account the interests of justice.

<sup>44</sup> The judgment is that in *m.v. La Pampa Louis Dreyfus Armateurs SNC v Tor Shipping* 2006 (3) SA 441 (D).

person. The basis for the threatened arrest of the one and the actual arrest of the other was that they were associated ships in relation to the ship in respect of which the claim had arisen. Thirdly, it was not correct to say that the claims were the same in that, entirely separate from the question of association, they lay against a different defendant namely Takamaka and not LDA. Lastly, as already pointed out, if there had been adequate security for the claim - and it was conceded that there was no security for the claim against Takamaka - the further arrest would have been an abuse of process and could have been set aside on that basis alone. It is submitted that the reasoning is so flawed that it provides no assistance in regard to section 3(8).

There seems to be only one possible situation in which in South Africa there could be a re-arrest of the same vessel after security had been provided. That would be where the vessel was initially arrested, say in Durban, and after being released against the provision of security was then re-arrested when it called at Cape Town. To that extent there is some parallel with the Arrest Convention and section 3(8) would clearly apply in those circumstances to preclude the second arrest. However, it must be conceded that such conduct on the part of the claimant would be extremely unusual and it is by no means clear why a claimant would follow that course.<sup>45</sup> Apart from that unusual situation, however, it is hard to see that section 3(8) has any particular relevance in the South African context.

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<sup>45</sup> It is conceivable that a claimant might do this in order to secure a procedural advantage such as that the case would come to trial more quickly in the one jurisdiction rather than the other or that it would be more convenient to its lawyers and witnesses for the case to be held in the other jurisdiction or possibly to take advantage of a local precedent. However, none of these scenarios is particularly likely. In practice if there are reasons why it would be more convenient to proceed in a provincial jurisdiction rather than the one where the vessel is available to be arrested the parties would agree when security was furnished to provide it in the other jurisdiction. An alternative situation that I have encountered in practice, which might have resulted in two arrests in the same jurisdiction, was one where a claim arising from damage to cargo could have arisen under either the bill of lading or a charterparty. (*C/f Intercontinental Export Company (Pty) Limited v mv 'Dien Danielsen'* 1982 (3) SA 534 (N)). The vessel had been arrested *in rem* in respect of the claim under the bill of lading but any claim under the charterparty was subject to arbitration in New York and it was suggested that notwithstanding the subsisting arrest she should be arrested under section 5(3) for security for the arbitration proceedings. That would have brought section 3(8) squarely into play. The problem was resolved by having the court attach conditions to the existing arrest in terms of section 5(2)(c) of the Act ensuring that any security given would cover the claim in both sets of proceedings. That obviated the need for a second arrest.

The limited usefulness of section 3(8) in the South African context is reinforced by the provisions of section 5(2)(d) which permit a further arrest or attachment of property in order to provide additional security for any claim. Once again there can be little doubt that the initial source of this provision lies in the qualification in Article 3(3) of the Arrest Convention that a further arrest, either of the particular ship or of a sister ship, can be maintained if there is good cause for doing so. The difference is that when these provisions were debated at the CMI conference the initial stance of the delegates appears to have been that an additional arrest merely because the security initially provided had proved inadequate was undesirable, but that where the value of the security had declined due to fortuitous matters over which the claimant had no control, such as a depreciation of currency<sup>46</sup> this justified an exception to the ordinary rule. By contrast - and yet again demonstrating the consistent pattern in the Act of departing from the provisions of the Arrest Convention - section 5(2)(d) is directed at permitting a second arrest of property, whether or not the same property as that initially arrested, in order to obtain additional security. In adopting this approach the South African Act foreshadowed the conclusion of the International Convention on Arrest of Ships 1999<sup>47</sup>. Article 5 of the 1999 Convention deals explicitly with the right of re-arrest and multiple arrest and reads as follows:-

- ‘1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be re-arrested or arrested in respect of the same maritime claim unless:-
- (a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of the security may not exceed the value of the ship; or
  - (b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person’s obligations; or
  - (c) the ship arrested or the security previously provided was released either:-
    - (i) upon the application or with the consent of the claimant acting on reasonable grounds,
    - or
    - (ii) because the claimant could not by taking reasonable steps prevent the release.

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<sup>46</sup> Or, it is submitted, if the security was furnished in the form of a guarantee, the insolvency of the guarantor a situation that occurred when a P&I Club went into liquidation some years ago.

<sup>47</sup> Hereafter the 1999 Convention. This Convention has not yet entered into force as insufficient States have acceded thereto. There is a convenient comparison of the text of the 1999 Convention with that of the 1952 Convention in Berlingieri, *op. cit* 455-467.

2 Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:-

- (a) the nature or amount of the security already provided in respect of the same claim is inadequate; or
- (b) the provisions of paragraph 1(b) or (c) of this Article are applicable.’

Under this Article the ship that was originally arrested can be re-arrested in order to obtain additional security, provided that the total amount of security so obtained does not exceed the value of the ship. However, a sister ship can be arrested for the purpose of obtaining additional security going beyond the value of the original vessel. In the result the international trend at least in this respect has been towards the model contained in the South African statute.

(iv) **Conclusion in regard to the effect of section 3(8)**

In the result it is submitted that the impact of section 3(8) as read with section 5(2)(d) is relatively limited. In the first place the section is only applicable where there has been an actual or deemed arrest in South Africa and security has been furnished to procure the release of the property arrested or to prevent its arrest. On the plain language of section 3(8) it appears to prohibit only the re-arrest of the property originally arrested where it was released against the provision of security. Even that limited constraint is itself constrained by the fact that the re-arrest of that property for the purpose of obtaining additional security is expressly permitted under section 5(2)(d). It is difficult to see why any claimant would seek to re-arrest property if it had already obtained an arrest, actual or deemed, and is adequately secured for its claim. If the claimant is fully secured there is no reason to countenance a second arrest, as it would constitute an abuse of the court’s process. If it is accepted that section 3(8) relates only to the property that is the subject of the original arrest, then an attempt to arrest other property can be dealt with as an abuse of process. Of course, if the purpose of the arrest is to obtain additional security and the claim for such additional security is justified then the further arrest is permissible in terms of section 5(2)(d), whether it is the original property or other property that is sought to be arrested.

Even if one gives section 3(8) a broader meaning as referring to all property<sup>48</sup> then its sole effect is to preclude the commencement in South Africa of two actions *in rem* in respect of the same claim where that claim has already been fully secured by a previous arrest of property and the giving of security therefor as a precursor to the commencement of the first action.<sup>49</sup> To the extent that the purpose of a second arrest is to engage in the type of procedural manoeuvring mentioned earlier section 3(8) precludes it. However outside these parameters the section has little operative effect and that is reflected in the few instances where it has received judicial consideration.

(v) **Section 3(8) and associated ships**

On the approach to section 3(8) set out above it has no application as a ground for setting aside the arrest of the vessel either where the ship concerned has been arrested and it is thereafter sought to arrest an associated ship or where proceedings are brought against two or more associated ships in respect of the same claim. The reason is simply that the second vessel sought to be arrested will not previously have been arrested and security will not have been furnished for it. That has led to it being a standard provision of security furnished either in consequence of an arrest or to prevent an arrest that the claimant being furnished with the security should agree not to arrest not only the vessel in question but also any property owned by the same owner and any vessel in associated ownership. Such a provision is decisive of the question of re-arrest at least as far as any South African court is concerned.

The position would be different if the word ‘therefor’ is ignored in section 3(8) and it is interpreted as applying to all property and any prior arrest in consequence of which security has been furnished for the claim. In that event a prior arrest of one vessel would preclude the arrest of an associated ship or even the ship concerned if the original arrest was of an associated ship.

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<sup>48</sup> Thereby discounting the word ‘therefor’ in the section.

<sup>49</sup> It is unnecessary to mention the possibility of a further security arrest under section 5(3) of the Act as such a claim would inevitably founder on the basis that the claimant already held adequate security for its claim in the proceedings before an arbitration tribunal or some other court

However as already noted it is unclear why a claimant who is already fully secured for its claim should wish to go to the trouble and expense of seeking a further arrest. Perhaps the one practical situation would be where the security had been furnished by a party that subsequently went into liquidation as was the case in the *Ivory Tirupati*. That is a relatively unusual occurrence so the problem is not likely to crop up frequently. Overall the proper conclusion is that section 3(8) is not directed at the arrest of associated ships after there has been an arrest of the ship concerned. Nor is it directed at preventing multiple arrests of associated ships. If there is any such prohibition in the Act it must be found elsewhere.

(d) **Section 3(6) of the Act**

Once the notion that section 3(8) of the Act applies in this situation has been refuted it is necessary to concentrate on those provisions of the Act that create the right to bring an action *in rem* against an associated ship in order to determine whether they limit a claimant to a single arrest of either the ship concerned or an associated ship. The critical provisions are section 3(5) and (6) which deal with the institution of an action *in rem* in the ordinary course and the institution of an action *in re* against an associated ship. It is as well at the outset to remind oneself of the language of these sections. They read as follows:-

‘(5) An action *in rem* shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one of more of the following categories against or in respect of which the claim lies:-

- (a) the ship, with or without its equipment, furniture, stores or bunkers;
- (b) the whole or any part of the equipment, furniture, stores or bunkers;
- (c) the whole or any part of the cargo;
- (d) the freight;
- (e) any container, if the claim arises out of relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;
- (f) a fund.

(6) Subject to the provisions of subsection (9) an action *in rem*, other than such an action in respect of a maritime claim contemplated in paragraph (d) of the definition of ‘maritime claim’, may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.’

In the *Fortune 22* Thring J fastened upon the words ‘instead of’. He said<sup>50</sup>

‘It seems clear to me that, at least *prima facie*, the use of the word ‘instead of’ entails that a claimant may not arrest both the offending ship and an associated ship he may arrest either the one or the other, but not both. That is the ordinary meaning of the phrase ‘instead of’. It cannot in its ordinary meaning be construed to mean ‘as well as’ or ‘in addition to’. hus *The Shorter Oxford English Dictionary* has for ‘instead of’, *inter alia* :

“in place of, in lieu of, in room of; for, in substitution for.”’

In other words Thring J held that the words ‘instead of’ implied some kind of election on the part of the creditor to pursue its claim against either the ship concerned or an associated ship to the exclusion of the other. Although the point was not before him that conclusion indicates that a claimant who had elected to pursue a claim against associated ship A would thereafter be precluded from pursuing the same claim, if unsatisfied, against associated ship B.

It is always dangerous in the process of statutory interpretation to start from the premise that the language used has a definitive grammatical meaning, particularly when that language is examined in isolation divorced from its context. The proper approach to interpretation is that stated by Wessels AJA<sup>51</sup> when he said:-

‘In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the:-

“Matter of the statute, its apparent scope and purpose and within limits, its background”.

In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the legislature and states its legal effect with reference to the facts of the particular case which is before it.’

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<sup>50</sup> 163H-I:

<sup>51</sup> *Stellenbosch Farmers’ Winery Limited v Distillers Corporation SA Limited and Another* 1962 (1) SA 458 (A) at 476E-G; *Feldman v Migdin NO* 2006 (6) SA 12 (SCA), para. [16]; *Desert Palace Hotel Resort (Pty) Limited v Northern Cape Gambling Board* 2007 (3) SA 187 (SCA), para. [8].

The need to balance these two elements of language and context has been emphasised on many occasions by our Courts most recently by the Constitutional Court in a judgment of Sachs J<sup>52</sup> where he said:-

‘[17] Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, I examine the context in which the word ‘may’ is used. The importance of context in statutory interpretation was underlined by Schreiner JA in *Jaga v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G-H as follows:-

“Certainly no less important than the oft repeated statements that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’ as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary, on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose and, within limits its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the enquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has, or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning, or may from the beginning consider the context and the language to be interpreted together.”

[18] Schreiner JA went on to point out that whatever approach is adopted, the Court must be alert to two risks. The first is that the context may receive an exaggerated importance so as to strain the language used. The second is ‘the risk of verbalism and consequent failure to discover the intention of the law-giver’. He emphasised that ‘the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.’”

With respect to Thring J he fell into the second trap identified by Schreiner JA. The error was compounded by using an out of date edition of a dictionary and selecting only a part of the dictionary definition, without explaining why that part should have pre-eminence. At the time of his judgment in the then current edition of the dictionary the full definition of the word ‘instead’<sup>53</sup> read:

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<sup>52</sup> *South African Police Service v Public Servants’ Association* 2007 (3) SA 521 (CC), paras. [17] and [18]

<sup>53</sup> *The New Shorter Oxford English Dictionary* (4<sup>th</sup> ed, 1993) Vol. 1, 1382. Thring J does not explain why he selected the meaning that he did. The dictionary does not rank its definitions in order of preference, but in accordance with the date when the word in question was first used in that particular sense. Thus the range of meanings given for the first definition date back to the Middle English period between 1150 and 1349 CE, whilst the later definition is from the middle of the 17<sup>th</sup> century. In many cases a more recent meaning will be the more appropriate one to select.



- '1. *Instead of, in place of, in lieu of, for, rather than ME*
2. *As a substitute or alternative M17.*'

Other leading dictionaries available at the time illustrate that the use of the expression 'instead of' conveys different meanings depending upon the context. Thus the *Collins English Dictionary*<sup>54</sup> gave as the meaning of the prepositional expression 'instead of':

*'In place of or as an alternative to'.<sup>55</sup>*

This clearly illustrates that 'instead of' will sometimes posit an election, where the choice of one excludes the possibility thereafter of choosing the other, and sometimes provides several options or alternatives, to be pursued as the party in question deems appropriate. Whether the one or the other is intended in section 3(6) will depend upon context rather than any clear indication from the language used in the section as to which meaning is intended.

The context of section 3(6) within the Act is provided generally by section 3 and in particular by section 3(5). Section 3 is a section that deals with the form of proceedings in admiralty. Its purpose is to identify the forms of actions that are permissible in admiralty proceedings. That is apparent from the long title of the Act which identifies one of its purposes as being to specify the procedures applicable in those divisions of the High Court that have admiralty jurisdiction. Sections 3(1) to (4) deal with the action *in personam*. Then section 3(4) provides that:-

'Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action, a maritime claim may be enforced by an action *in rem*:-  
 (a) if the claimant has a maritime lien over the property to be arrested; or  
 (b) if the owner of the property to be arrested will be liable to the claimant in an action *in personam* in respect of the cause of action concerned.'

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<sup>54</sup> 3<sup>rd</sup> Ed. 1991, p801

<sup>55</sup> The current 6<sup>th</sup> edition, (2007) has the same definition.

The action *in rem* is accordingly a permissible form of proceeding in admiralty, although the range of instances where it may be available to a claimant will be narrower than in the case of an action *in personam*.

One then arrives at section 3(5). This is the primary section dealing with the institution of the action *in rem* and it requires that such an action ‘shall’ be instituted by the arrest of the ship or other property in respect of which the claim lies.<sup>56</sup> This section lays down the procedure which must be followed in order to institute an action *in rem*.<sup>57</sup> However, while the section says that the procedure is obligatory (‘shall be instituted’), which implies that it is the only manner in which an action *in rem* can be instituted, section 3(6) provides an alternative. An action *in rem* ‘may’ instead be brought by arresting an associated ship. When the two sections are viewed together the alternative created by the use of the words ‘instead of’ is seen to be an alternative in regard to the procedure to be followed in instituting an action *in rem*.<sup>58</sup> A claimant wishing to pursue its claim by way of an action *in rem* may institute that action by arresting the ship concerned or an associated ship instead of that ship.

There is an important reason for using the words ‘instead of’ which has nothing to do with the claimant having to elect between the two potential ways of instituting an action *in rem*. It is that the associated ship arrest is only available in circumstances where the claimant might otherwise wish to bring an action *in rem* against the ship concerned. It is not available as a permissible procedure in circumstances where any other property identified in section 3(5) is the target of an action *in rem*. There is no such concept in the Act as ‘associated property’

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<sup>56</sup> If that provision had stood alone it would have reflected the English position in admiralty prior to 1956, which would also have been the South African position in regard to Courts exercising admiralty jurisdiction under the Colonial Courts of Admiralty Act, 1890. It flows from the judgment in *The Beldis* [1936] P51.

<sup>57</sup> *M.v. Jute Express v Owners of the cargo lately laden on board the m.v. ‘Jute Express’* 1992 (3) SA 9 (A).

<sup>58</sup> It is submitted that this approach which views sections 3(5) and (6) as embodying in the first instance alternative procedures for instituting an action *in rem* is consistent with what was said in *Euromarine International of Mauren v The Ship Berg* 1986 (2) SA 700 (A) 712D. The fact that section 3(6) may have other effects that will be referred to later does not alter this initial premise.

generally.<sup>59</sup> The use of the expression ‘instead of’ makes it clear that it is only in relation to the possibility of the arrest of the ship concerned that any alternative method of commencing proceedings is permitted.

It is a natural use of language to use ‘instead of’ to indicate that there is another way of instituting an action *in rem* apart from arresting the ship in respect of which the claim arises, particularly in the light of the peremptory language of section 3(5). To omit ‘instead of’ from section 3(6) would create an uncomfortable conflict between the peremptory language of section 3(5) and the permissive language of section 3(6). Linguistic analysis suggests therefore that it is not a necessary or even the more natural conclusion from the use of the words ‘instead of’ in section 3(6) that it confronts the claimant with an election between mutually exclusive options as opposed to providing two alternative and complementary routes to reach the same goal, namely payment of the claim. Whether that is the effect of the language in this instance, depends upon a consideration of the broader context. What should be said at this stage is that the Court’s view of the natural meaning of these words in the *Fortune 22* is not sustainable. In fairness to the judge it is not clear from the judgment to what extent his approach to the ordinary meaning of ‘instead of’ was challenged in argument. What is apparent is that he made little attempt to place section 3(6) in its statutory context with a view to ascertaining the meaning to be given to this expression.

(e) **The contextual factors relied on in the *Fortune 22*:**

In the *Fortune 22* the Court found support for its conclusion as to the ordinary meaning of the words ‘instead of’ in three places - the dictionary, the English law and the Arrest Convention - and rejected one argument that would have rendered the entire exercise academic. That argument was that, whatever constraints the language of section 3(6) may impose upon the power to arrest *in rem* in South Africa they are not applicable where the initial arrest of the ship concerned occurred in a foreign jurisdiction and it is thereafter sought to arrest an associated ship in South Africa. It is unnecessary in this regard to traverse in any great detail ground already

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<sup>59</sup>Bradfield, ‘Guilt by Association in South African admiralty law’ [2005] LMCLQ 234.

covered earlier in this chapter. The Court's approach to this issue was fundamentally flawed. Instead of asking itself why the legislature would have imposed such a limitation in favour of arrests in other countries, which would not be reciprocated in those jurisdictions, the Court started by asking itself why the South African legislature would permit an associated ship arrest after there had been an arrest of the ship concerned in another jurisdiction. The short answer to that question is that where the arrest of the ship concerned has not resulted in the creditor recovering payment or being secured for the debt sought to be pursued, the purpose of the South African legislation is to enable the creditor to turn to the associated ship with a view to obtaining payment of its claim.

This basic error of approach was compounded by the Court's reliance on the English law as stated in *The Banco*, *supra* and indirectly on the provisions of article 3(3) of the Arrests Convention. As demonstrated above the underlying reasons why the states that are party to the Convention would not permit multiple arrests in different jurisdictions that adhere to the Convention are entirely inapplicable to the situation in South Africa, which does not adhere to the Convention. That is compounded by the fact that the associated ship arrest is a phenomenon that is distinctly different from the sister ship arrest of the Convention and serves a different purpose. Accordingly the Court's reliance on these factors was misplaced and its rejection of this argument wrong.

Not only did the Court have regard to the decision in *The Banco* but it apparently thought that it was bound to follow it because of the provisions of sections 6(1) and (2) of the Act. This was a puzzling conclusion. These sections deal with the law to be applied by the Court in the exercise of its admiralty jurisdiction.<sup>60</sup> They direct that the Court, in regard to any matter, where a

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<sup>60</sup>The section reads as follows:

‘(1) Notwithstanding anything to the contrary in any law or the common law contained a Court in the exercise of its admiralty jurisdiction shall:-

(a) with regard to any matter in respect of which a Court of Admiralty of the Republic referred to in the Colonial Courts of Admiralty Act 1890 of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty

South African Court exercising admiralty jurisdiction would have applied English law prior to 1983, to apply English law to such matter. Roman Dutch law is to be applied to all other matters. Prior to 1983 a sister ship arrest was not permitted nor was there an associated ship jurisdiction in South Africa. It is entirely unclear therefore on what basis it can be thought that the English law should be applied to the interpretation of the South African statutory provisions governing associated ships<sup>61</sup>. The peculiarity of this approach is compounded by the fact that in English law, even to the present day, there is no associated ship jurisdiction. How then is one to apply the English law to these questions? It is submitted that the reference to section 6 was entirely inappropriate. There is no reason why the associated ship jurisdiction must be interpreted in the light of English law on different questions nor why South African Courts should be bound in its approach to the associated ship by English decisions on those different questions.

One further comment should be made in regard to the approach adopted in the judgment. In dealing with the fact that the *Mount Ymitos* had been arrested in Hong Kong the Court said that there was no suggestion that the arrest was in any irregular or invalid or that the default judgment obtained by the respondent was open to attack. All of that is no doubt true. However, as the default judgment was obtained after the *Mount Ymitos* had been sold by way of a judicial sale it was not open to the respondent to rely upon that judgment for the purpose of arresting the associated ship. Accordingly it had arrested the *Fortune 22* on the basis of its original claim for repairs undertaken to the *Mount Ymitos*. Had the default judgment been taken, prior to the sale of the *Mount Ymitos*, then at the time that maritime claim arose the *Mount Ymitos* would have been owned by the same party that owned the *Fortune 22* at the time of its arrest in Saldanha Bay. In those circumstances it seems plain that the *Fortune 22* could have been arrested in an action *in*

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jurisdiction would have applied with regard to such a matter, at such commencement, insofar as that law can be applied;

(b) with regard to any other matter, apply the Roman Dutch law applicable in the Republic;

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.'

<sup>61</sup> The court would have been better guided by following the clear approach of the Federal Court of Australia in *Tisand (Pty) Ltd and others v The Owners of the Ship MV 'Cape Moreton' (ex 'Freya')* [2005] FCAFC 68; (2005) 143 FCR 43 para [59] which unequivocally said that the interpretation of the Australian Admiralty Act was to be undertaken in accordance with the principles of Australian common law. See also *Kent v SS 'Maria Luisa' (No 2)* (2003) 130 FCR 12, 27.

*rem* against it as an associated ship in order to enforce the maritime claim constituted by the judgment against the *Mount Ymitos*. Why then should it have been impermissible to arrest the same ship for the purpose of enforcing the underlying claim that had given rise to that judgment? This problem is not addressed but the fact that it exists further demonstrates that the approach adopted in the judgment in the *Fortune 22* is incorrect.

### 3 **POLICY FACTORS IN FAVOUR OF MULTIPLE ARRESTS:**

The policy which favours an interpretation of section 3(6) that permits a claimant to pursue a maritime claim against both the ship concerned and one or more associated ships lies with the underlying purpose of this jurisdiction, which is to assist the creditor to recover on that claim. It is the clear purpose of this jurisdiction to permit claimants to penetrate behind a screen of one-ship companies to ensure that the person standing behind those companies takes responsibility for payment of the debt. The beneficiary of the ownership of a vessel, either directly or through the ownership or control of the shares in the company owning that vessel, is to be prevented from 'ring-fencing' his or her interests in other vessels from liability for claims against the first vessel by resort to the registration of those other vessels in separate legal ownership. That being its purpose, an interpretation of section 3(6) that stultifies that purpose by excluding the jurisdiction where there has been an unsuccessful arrest is to be avoided. In simple terms the purpose of the jurisdiction is to enable the creditor to obtain payment. Although the expedient may seem a little clumsy - separate actions against a series of separate vessels that are associated ships, until payment is obtained - the practical reality is little different from the situation that would arise if the vessels were in common ownership. If the existence of the companies standing between the vessels themselves and those beneficially interested in those vessels could be stripped away, the claimant would be able to do precisely the same by way of execution against any vessel of a single judgment. The exercise here is more complex but the result is the same.

It is important to bear in mind that it has been authoritatively decided that an action *in rem* commenced by the arrest of an associated ship is not to be regarded as an action against the ship

concerned pursued by different means.<sup>62</sup> The basis of the judgments in *The Berg* is that the action *in rem* against the associated ship is a different and separate action from the action against the ship concerned. An entirely different debtor is involved. Why then should the legislature be concerned to prevent a creditor from pursuing each debtor against whom it has a claim? In other situations where two or more debtors are either jointly or jointly and severally liable to a creditor our law will ordinarily permit the creditor to choose which debtor to sue and, if unsuccessful in a claim against one because of the latter's impecuniosity, thereafter to pursue another. Why should this be any different in admiralty? The associated ship jurisdiction involves different defendants, different vessels and different corporate entities. By legislative *fiat* each of those corporate entities is liable for the debts of the other at least so far as their interest in the associated ships is concerned<sup>63</sup>. In the result one of the advantages that would ordinarily accrue to the person standing behind the different companies from the fact of registering each vessel in a fleet in separate corporate ownership has been removed by statute. It is entirely unclear why the legislature having chosen to do that and extend the scope of liability accordingly would at the same time have forced the unpaid creditor to choose which of a range of potential debtors it wished to pursue.<sup>64</sup> The result of such a construction would be that the benefit that the legislature extended with the one hand would be largely removed with the other.

Once one accepts in principle that the purpose of the associated ship jurisdiction is to enable an unpaid creditor to pursue its claim not only against the ship concerned in an action *in rem*, but also against associated ships, it is difficult to see why that aim should be hampered by an approach that would compel the claimant to select from one of a number of vessels which one it will pursue, whilst recognising that if its choice is mistaken, because there are substantial claims against the other vessel that rank in preference to its claim, they will lose not only their claim against the ship concerned, but also their claim against other associated ships. This has

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<sup>62</sup> *Euromarine International of Mauren v The Ship 'Berg'* 1984 (4) SA 647 (N) 655H-656A; *Euromarine International of Mauren v The Ship 'Berg'* 1986 (2) SA 700 (A) 712C-E.

<sup>63</sup> There is no liability beyond the associated ship. See chapter 12.

<sup>64</sup> The result would be like a game of Blind Man's Bluff. The unpaid creditor will rarely know which of the one-ship companies is most likely to generate a surplus sufficient to pay the creditor's claim after paying preferent claims.

potentially serious implications. For example, if the claim is one that gives rise to a maritime lien, is the effect of unsuccessfully pursuing the claim against an associated ship<sup>65</sup> that the maritime lien is discharged? If not, and the position is merely that the ship concerned cannot be arrested in South Africa because of the prior proceedings against an associated ship, leaving the creditor to pursue the ship concerned with the security of its maritime lien, the position is absurd. The claimant will be able to make a claim against an associated ship in South Africa, but that will not preclude it from arresting the ship concerned in another jurisdiction and enforcing its maritime lien. However, if the ship concerned is the first one to be arrested in a jurisdiction other than South Africa, then according to the judgment in the *Fortune 22* it will not be permissible to arrest an associated ship in South Africa to enforce the claim. That is an absurd situation and cannot have been intended by the legislature.

There are other anomalies that arise from the approach adopted in the *Fortune 22*. South Africa exercises both an *in personam* jurisdiction under our common law, which is civilian in origin and structure, and an *in rem* jurisdiction arising from English admiralty law being transplanted to this country. Even on the interpretation given to section 3(6) in the *Fortune 22* or a narrower interpretation prohibiting two arrests in this country, multiple proceedings cannot be entirely avoided. It is still open to a maritime claimant to attach the ship in respect of which the maritime claim arose in proceedings *in personam* against its owner and to arrest an associated ship.<sup>66</sup> That possibility shows that the South African legislature has not set its face implacably against there being more than one action in this country in respect of the same maritime claim.

A further consideration that should be borne in mind is that in the ranking of claims under section 11 it is plainly contemplated that associated ship claims can be brought forward against a

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<sup>65</sup> 'Unsuccessfully' referring not to the action being unsuccessful but to an inability to obtain satisfaction of the resultant judgment.

<sup>66</sup> Shaw *Admiralty Jurisdiction Practice in South Africa* 37, footnote 12 mentions this possibility. In *m.v. La Pampa Louis Dreyfus Armateurs SNC v Tor Shipping* 2006 (3) SA 441 (D) the court held that this could not possibly have been the intention of the legislature, but to arrive at a different conclusion involves a substantial re-writing of the Act. Overall the reasoning in the judgment is not convincing.



fund.<sup>67</sup> This produces a further range of anomalies if the approach in the *Fortune 22* is correct. There seems to be no reason why a claimant could not pursue the same maritime claim against various funds constituted by the sale of several associated ships by arresting each fund *in rem*. The restriction that Thring J perceived in regard to arrests of associated ships is clearly not applicable in regard to the arrest of a fund. Nor would it matter if the claimant had already commenced an action in South Africa either against the ship concerned or against an associated ship. Once the fund was constituted it would be entitled to pursue its claim against that fund. It seems insensible to have a situation where the creditor can pursue the claim against a number of funds constituted from the sale of vessels, but cannot do so by arresting the ships themselves, prior to their sale. There does not appear to be any practical reason why this should be so.

#### 4 **PROTECTION AGAINST OPPRESSION:**

The one possible reason for having a limit of this type is to prevent a litigant from being harassed in multiple suits.<sup>68</sup> However, the associated ship jurisdiction involves different defendants, different vessels and different corporate entities. In no other circumstances would it be open to the different ship owning companies to complain that they were being harassed as litigants because several ships were subjected to simultaneous arrests in different jurisdictions where, for example, each ship owning company had given a guarantee for the payment of amounts outstanding in respect of the supply of bunkers to the fleet or had given cross-guarantees for amounts borrowed on mortgage for the acquisition of vessels. In any other situation the one-ship owning companies would be asserting their separate corporate identity as a protective measure. It should hardly be open to them when they have invoked the advantages of separate corporate personality for other purposes to complain when the shoe pinches.

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<sup>67</sup> S11(11)(b).

<sup>68</sup> The problem of that occurring in multiple jurisdictions, which is the concern of the Arrest Convention, is not applicable in South Africa.

In any event there are ample provisions in the Act and the common law to assist South African courts in preventing the abuse of this novel jurisdiction. It must be accepted that it is debatable whether the common law defence of *lis alibi pendens* or the statutory plea of *forum non conveniens* contained in section 7(1)(a) of the Act can be invoked to assist a defendant in this situation. This is because an associated ship arrest involves a different defendant from the debtor *in personam* or the ship concerned or any other associated ship. Accordingly there is not the identity of litigation that underpins the defence of *lis alibi pendens* nor are the proceedings the same as required by section 7(1)(a) of the Act. In addition there seems to be no reason why the broad powers given to the Court under section 7(1)(b) of the Act could not be invoked to prevent abuse. There the Court may stay any proceedings ‘if for any sufficient reason the Court is of the opinion that the proceedings should be stayed’. That is a very comprehensive power and there seems to be no reason why the Courts should not invoke it if they are satisfied that proceedings are being pursued by way of multiple arrests *in terrorem* where it is unnecessary to do so.

Three other factors come into the equation. Where the arrest is an arrest for the purposes of obtaining security, it is clear from the authorities<sup>69</sup> that an arrest will not be permitted where the claimant is already adequately secured in respect of the claim. Secondly, in terms of section 5(2)(c) of the Act a Court is empowered to order that any arrest be subject to such conditions as to the Court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise.<sup>70</sup> Thirdly, in terms of section 173 of the Constitution the High Court in South Africa has the inherent power to protect and regulate its own process and to develop the common law taking into the interests of justice. In any case that power alone would suffice to enable the Court to deal with any situation of overt

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<sup>69</sup> *Cargo laden and lately laden on board the m.v. Thalassini Avgi v m.v. Dimitris* 1989 (3) SA 820 (A) 833A; *mv Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA).

<sup>70</sup> S5(2)(c) of the Act. The power in question is broad and general and on proof that a litigant is seeking to abuse the jurisdiction of our Courts or harass its opponent could readily be invoked. This was done in one case where the claimant had commenced litigation on the same claim in four courts in three countries and arrested vessels in each one. It then refused to release some of those vessels even though security had been furnished in full for its claim in South Africa. An application was brought under s5(2)(c) in the High Court in Durban and, before an order could be made, the claimant withdrew all of the arrests and accepted the security.

oppression. It is not, of course, oppression that multiple ships have been arrested. The remedy will usually be close to hand in the form of either paying the debt or securing it adequately.

Finally, in regard to abuse, the Act expressly provides a remedy in damages for such conduct. This is to be found in section 5(4) which provides that:-

‘Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of Court shall be liable to any person suffering loss of damage as a result thereof for that loss or damage.’

Most of the potential instances of abuse that can be imagined would result in a claim under this section. It is perhaps an indication that fears of abuse are exaggerated that very few cases have been pursued under this section.<sup>71</sup>

## 5 CONCLUSION

Although there is much in the judgment of Smalberger JA in the *Heavy Metal*<sup>72</sup> with which one can disagree there is no question but that he was correct when he said that:-

‘The principal purpose of the Act is to assist the party applying for arrest rather than the party opposing it.’<sup>73</sup>

That was made absolutely clear from the outset. The Appellate Division (as it then was) accepted the explanation by the draftsman of the Act that:-

‘...the purpose of the Act was to make the loss fall where it belonged by reason of ownership, and in the case of a company, ownership or control of shares.’<sup>74</sup>

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<sup>71</sup> There are three reported instances of cases involving claims under this section. I am aware of a handful of others where security has been sought or obtained for such claims but nothing has come of them.

<sup>72</sup> *M.V. Heavy Metal: Belfry Marine Limited v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA)

<sup>73</sup> P1106

To that end a novel and potentially controversial legal institution, the associated ship, was created. To many it was seen as trespassing too far upon the notion of separate corporate personality that underpins company law throughout the world. Be that as it may, the South African legislature took the plunge and introduced the associated ship arrest and the action *in rem* commenced by way of an action against an associated ship. No other jurisdiction has gone as far.

Having taken that bold step it is difficult to conceive of any reason of practice or policy why the legislature should then have set about very largely negating the chief benefit accruing from the associated ship jurisdiction, namely the ability to arrest additional vessels other than the ship concerned, by forcing the claimant to make an election between the ship concerned and an associated ship, and having made that election to be restricted by it. Of course, where the vessel arrested is of substantial value so that security is provided for the claim, nothing more need be said. But in the one situation where multiple arrests would be a practical resort offering obvious benefits to claimants, it is suggested that the legislature withheld its assistance. That situation is most commonly the one where the particular fleet of vessels that are associated with one another are experiencing financial difficulties.<sup>75</sup> In that situation if the unpaid claimant is compelled to choose between the ship concerned and one or other associated ships, in the knowledge that the choice is irrevocable, the purpose of giving claimants the right to arrest an associated ship becomes at best speculative and at worst a lottery. The unpaid creditor whose claim does not enjoy any particular precedence in the ranking of claims will have no means of knowing which vessel should be the target of its claim. There is no apparent reason why claimants should be placed in this dilemma. If they choose to target all possible vessels they do so knowing that in the distribution of a fund in terms of section 11 of the Act their claims will rank after the direct claims against the fund. Accepting that this will be their situation the rationale for their being entitled to advance such a claim is, if anything, strengthened. Nor is there any good reason why,

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<sup>74</sup> *Euromarine International of Mauren v The Ship Berg* 1986 (2) SA 700 (A) 712A-B.

<sup>75</sup> As in the case of the Eddie Steamship Group the collapse of which led to much litigation in the early stage of the Act. *Summit Industrial Corporation v Claimants against the fund comprising the proceeds of the sale of the m.v. Jade Transporter* 1987 (2) SA 583 (A) 590I-J.

if one of the vessels in a fleet is sold and generates a surplus beyond the claims of direct creditors, creditors who are creditors on the basis of the associated ship should not be entitled to advance their claims. Indeed permitting them to do so serves the very purpose that the Act set out to achieve.

It is submitted that it would take very clear language indeed in those circumstances to justify the conclusion that a claimant is not entitled to pursue its claim both against the ship concerned and against any vessel that is an associated ship in relation to the ship concerned. The use of the words ‘instead of’ to describe an alternative procedure by way of an action *in rem* is not, it is submitted, a strong and sufficiently cogent indication that this was the legislature’s intention. The language used is not such as to demand that result and all indications of purpose and policy underpinning the associated ship jurisdiction point in the opposite direction.

At the commencement of this chapter it was suggested that there are three questions that fall to be answered in this regard. They are the following. Firstly, can a claimant arrest both the ship concerned and an associated ship in order to obtain full security for its claim or even for the purpose of instituting actions *in rem* against both the ship concerned and the associated ship in respect of the same claim? Secondly can the claimant, for either purpose, arrest more than one associated ship? Thirdly is it permissible for claimants to seek payment from more than one fund established pursuant to sales of vessels that are associated or is the claimant confined to selecting a particular fund? It is submitted that the answer is that properly construed the Act does not preclude a claimant from arresting both the ship concerned and an associated ship in separate proceedings, nor does it preclude the arrest of multiple associated ships or the pursuit of claims against more than one fund. Of course, if security has been furnished for the claim that will provide a separate and independent reason for a further arrest to be refused. But where the claim is unsecured it is submitted that there is no reason in the language of the legislation or in reasons of principle and policy to prevent the creditor from pursuing each and every vessel that is available to be arrested, whether the ship concerned, or an associated ship. Only in that way can true effect be given to the underlying purpose of this special jurisdiction.

## CHAPTER 9

### THE CONSTITUTIONAL DIMENSION

#### 1 SUPREMACY OF THE CONSTITUTION

Since the adoption of the Constitution<sup>1</sup> it is well established that all law derives its force from the Constitution and all laws and all legal institutions are subject to constitutional scrutiny.<sup>2</sup> An early suggestion that the common law existed in parallel with the Constitution<sup>3</sup> was decisively rejected by the Constitutional Court.<sup>4</sup> It follows that no less than any other law the Act and the legal institution of the associated ship must be tested and measured against the Constitution. So must the interpretation given to the provisions of the Act that create the notion of the associated ship and dictate its application in practice. In undertaking this constitutional scrutiny one is concerned with the nature and extent of the powers of the High Court to order the arrest of vessels as associated ships. Existing authority has held that the jurisdiction of the High Court has its foundation in section 169 of the Constitution and accordingly that: ‘Any issue as to the nature and ambit of those powers necessarily raises a constitutional question.’<sup>5</sup> Accordingly it is submitted that issues concerning the interpretation of the provisions of the Act dealing with the

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<sup>1</sup> The Constitution of the Republic of South Africa 1996.

<sup>2</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), where it was said in para. [44]: ‘There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law derives its force from the Constitution and is subject to constitutional control.’

See also: *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para. [38].

<sup>3</sup> *Commissioner of Customs and Excise v Container Logistics (Pty) Limited: Commissioner of Customs and Excise v Rennie Group Limited t/a Renfreight* 1999 (3) SA 771 (SCA)

<sup>4</sup> *Pharmaceutical Manufacturers Association, supra.*

<sup>5</sup> *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) para [17]; *S v Basson* 2005 (1) SA 171 (CC) para [111]; *Phillips and others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) at para [31]; *Sidumo and another v Rustenberg Platinum Mines Ltd and others* 2008 (2) SA 24 (CC)

associated ship and the jurisdiction of the courts to cause such vessels to be arrested raise a constitutional matter that can ultimately be determined by the Constitutional Court. Consequently all of the issues canvassed earlier in this work concerning the proper construction of these statutory provisions raise constitutional matters that could potentially come before that Court.<sup>6</sup> However for present purposes we are concerned with issues of constitutional compliance rather than general issues of interpretation important though those are and rather more likely to arise in practice. We turn then to scrutinise these provisions in the light of the Constitution.<sup>7</sup>

Such constitutional scrutiny occurs at two levels. The first is whether, in accordance with the principle of legality that underpins the Constitution<sup>8</sup> and the provisions of the Constitution the particular institution complies with the Constitution. The second is whether the institution as embodied in the relevant statute and construed by the courts infringes any of the constitutional rights conferred by the Bill of Rights contained in Chapter 2 of the Constitution, and if so, whether such limitation can be justified as being reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>9</sup>

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para [51].

<sup>6</sup> I am not aware of any attempt to take any issue relating to the interpretation of the associated ship provisions to the Constitutional Court.

<sup>7</sup> This is not to say that there may not be other constitutional issues that may arise under the Act. For example under Rule 4(2)(a) it is open to a claimant to approach the Registrar for the issue of a warrant of arrest without any prior intervention by a judge, although in appropriate cases the Registrar may refer the question whether a warrant should issue to a judge under Rule 4(2)(b). The question that arises from this is whether in issuing the warrant of arrest the Registrar is performing a judicial function that the Constitution reserves to the courts in terms of section 165(1) thereof. *C/f Standard Bank of South Africa Ltd v Saunderson and others* 2006 (2) SA 264 (SCA) paras [23] and [24]. However that question is not one that is peculiar to the associated ship jurisdiction and accordingly falls outside this study.

<sup>8</sup> *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras. [56] to [58]. Although some of these principles were first articulated under the Interim Constitution - the Constitution of the Republic of South Africa Act 200 of 1993 - they remain applicable.

<sup>9</sup> S36 of the Constitution. The section reads as follows:

‘1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:-

(a) the nature of the right;

In construing any particular law that is subject to constitutional scrutiny there are rules of interpretation prescribed by the Constitution and construed by the Constitutional Court that must always be borne in mind. The constitutional prescript<sup>10</sup> has two elements. The first is that in interpreting the Bill of Rights the court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom having regard where appropriate to both international law and foreign law. The second is that in interpreting legislation the court must promote the spirit, purport and objects of the Bill of Rights. This latter provision has been given an interpretational gloss by the Constitutional Court in holding that a court should favour that construction of a statute that best gives effect to the rights protected by the Bill of Rights and should prefer a construction that gives constitutional validity to a provision to one that would render it constitutionally invalid. In a recent decision<sup>11</sup> the Constitutional Court has restated these principles in the following terms:-

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(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

<sup>10</sup> In section 39 of the Constitution which reads as follows:-

'1. When interpreting the Bill of Rights, a court, tribunal or forum:-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

<sup>11</sup> *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC8



[82] In *Hyundai*,<sup>12</sup> we considered this approach under the Constitution and sketched it out as follows:-

“The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution”

[83] And in *Daniels*,<sup>13</sup> we elaborated on this approach and said:-

“Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to ‘promote the spirit, purport and objects of the Bill of the Rights.’ Consistent with this interpretive injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom. Thus where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred”

[84] We cautioned, however, that an interpretation that seeks to bring a provision within constitutional bounds should not be unduly strained. With this caution in mind, we held that courts “must prefer the interpretation of [a provision] that will bring it within constitutional bounds over those that do not” and added “provided that such an interpretation can be reasonably ascribed to the section”.<sup>14</sup>

## 2 **THE CONSTITUTION AND THE ASSOCIATED SHIP:**

There is no reason to believe that the associated ship as a legal institution conflicts with any aspect of the underlying principle of legality in terms of the Constitution. It derives its force from an Act of the former Parliament, the validity of which is preserved by paragraph 2 of Schedule 6 to the Constitution. The courts vested with jurisdiction under the Act retain that jurisdiction by virtue of paragraph 16(1) of the same Schedule. The provisions are reasonably precise and could

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<sup>12</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Limited and Others: In Re Hyundai Motor Distributors (Pty) Limited and Others v Smit NO and Others* 2001 (1) SA 545 (CC), para.[22].

<sup>13</sup> *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) para. [43]

<sup>14</sup> The Constitutional Court has used this approach to interpretation on a number of occasions with a view to avoiding having to strike down the provisions of a statute. However the formulation poses certain problems of its own. It is reasonably straightforward to apply where the court is faced with a stark choice between a constitutional and an unconstitutional interpretation of a statutory provision. It becomes complicated however where one party contends for an interpretation that is constitutionally valid, whilst the other contends for an interpretation that would infringe a constitutionally protected right, but does so on the basis that the infringement is justified under a limitation analysis. In that situation the latter interpretation may be more consonant with the language used in the provision and both the intention of the Legislature and the social purpose of the legislation. It is fair to say that the Constitutional Court has neither identified this problem nor sought to grapple with it.

not be attacked on the narrow ground of rationality.<sup>15</sup> Overall it is submitted that a constitutional attack on the validity of the associated ship provisions can only be brought on the basis that they infringe upon rights conferred by the Bill of Rights.

When one turns to the Bill of Rights the obvious provision to consider is section 25 which protects the right to property and provides:-

‘(1) No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.’

The first issue that arises in relation to this provision is the general one that stems from the recognition in the early cases concerned the associated ship that the effect of these provisions is that one company may be held liable for the debts of another company.<sup>16</sup> However, it is not limited to that situation. Even if, as a general rule, an associated ship arrest can pass constitutional muster, three cases that are sub-sets of the general situation may not<sup>17</sup>. These can be described as follows.

First, there is the situation where the ship concerned and the associated ship are owned by companies, both of which are controlled by the same individual, but where each company has minority shareholders and these are not common to both. In simple terms, the shares in company

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<sup>15</sup> This is an aspect of the principle of legality. It was expressed as follows in *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) para. [19] where it was said to require a:- ‘Rational relationship between the scheme which it adopts and the achievement of a legitimate Government purpose. Parliament cannot act capriciously or arbitrarily.’

See also *Affordable Medicine Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para. [74].

<sup>16</sup> Notionally the situation can arise where a company is liable for the debts of a natural person and *vice versa* but this is such an unlikely eventuality in practise that it can be ignored. It can never be the case that one natural person is held liable for the debts of another.

<sup>17</sup> There would be a fourth case if the approach adopted in Chapter 6, part 4(d), is incorrect and the commencement of the action for the purposes of effecting an associated ship arrest is (or can be) the date on which the summons is issued (or the papers in an application for a security arrest are issued) in which event there may be a lapse of time between the commencement date and the date of arrest during which the associated ship can pass into different and unrelated ownership so that at the date of its arrest there is no link between it or its owners and the ship concerned and its owners at the time the maritime claim arose.

A, that owns the ship concerned, are owned by X and Y with X being the controlling shareholder. The shares in company B, that owns the associated ship, are owned by X and Z with X again being the controlling shareholder. The constitutional question is whether it is open to Z in that case to complain that permitting the arrest of the associated ship in respect of the debts arising from the operations of the ship concerned, involves an arbitrary deprivation of his or her property interest in company B?

The second case flows from the decision in the *Heavy Metal*.<sup>18</sup> Here the court held that if the same person is the sole shareholder and director of two ship owning companies, albeit that he is purely the nominee in each case of two entirely separate and distinct individuals with no decision-making powers of his own and removable at will, the vessels owned by the two companies would nonetheless be associated. This arose because of the Court's construction of the deeming provision in section 3(7)(b)(ii) of the Act and in particular its construction of the expression 'power, directly or indirectly, to control the company' as embodying two distinct sources of such power. In this instance a vessel may be arrested as an associated ship even though the persons controlling the company owning the associated ship have no commercial connection, save for their choice of nominee shareholder and director, with the persons controlling the company that owns the ship concerned.

The third case flows from the presumption in section 1(3) of the Act that:-

'For the purpose of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.'

The primary instance in which this presumption will apply is where the demise charterer has, during the currency of the charter, incurred debts relating to the chartered vessel. The presumption has the effect of rendering the chartered vessel liable to arrest in respect of those

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<sup>18</sup> *M.V. Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) (hereafter '*Heavy Metal*'). The case is extensively discussed and criticised in Chapter 7, where the constitutional issue arising from the interpretation given by the majority of the SCA to the deeming provision in s3(7)(b)(ii) is mentioned. that issue is discussed in more detail in this chapter.

debts. To that extent it reflects the principle that for certain purposes the demise charterer is to be regarded *pro hac vice* as the owner of the vessel.<sup>19</sup> However, the presumption<sup>20</sup> goes further than that<sup>21</sup> because it permits the arrest of the demise chartered vessel as an associated ship in respect of the debts of a ship owning company controlled by the demise charterer. Thus if X, the demise charterer, controls a company that owns vessel A, in respect of which debts have been incurred, and through another company demise charts vessel B, for the duration of the demise charter the latter vessel will be liable to arrest as an associated ship in relation to A. This is plainly a distinct situation from that which would arise if the chartered vessel is arrested for debts incurred in respect of its operation in the course of the charter. In that situation the owner is in receipt of charter hire in return for which it has placed its vessel entirely within the power and under the control of the charterer. There one can see a basis for permitting the arrest of the chartered vessel in respect of debts not incurred by its owner.<sup>22</sup> However, where the chartered vessel is arrested as an associated ship that basis is absent. Hence a constitutional problem exists.

Although section 25 of the Bill of Rights is the obvious provision that may have application in relation to the associated ship it is not the only one. In Chapter 5 the approach taken by our courts to the onus of proof of association in proceedings where it is sought to set aside the arrest of a vessel was discussed. Attention was drawn to the reluctance of our courts to order discovery or refer the question of association for the hearing of oral evidence or to trial. These are not matters embodied in the provisions of the statute and as such are not vulnerable to being struck down as unconstitutional. They reflect the court's approach to procedural matters falling within its jurisdiction. However, two related questions do arise in respect of them. The first is whether

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<sup>19</sup> D J Shaw, *Admiralty Jurisdiction and Practice in South Africa*, 33, footnote 53 and the cases there cited.

<sup>20</sup> Inserted by section 10 of the Sea Transport Documents Act, 65 of 2000, with effect from the 20<sup>th</sup> June 2003.

<sup>21</sup> And further than the presumption in section 3(7)(c) which renders other ships owned by the demise charterer or owned by companies controlled by the demise charterer, liable to arrest as associated ships.

<sup>22</sup> The landlord's tacit hypothec over the property of third parties situated on the leased premises provides some analogy. *Kerr, The Law of Sale and Lease* (3rd ed.) 389 *et seq.*

the allocation of the onus (which is a matter of substantive law<sup>23</sup>) or the approach to the procedural issues of discovery and the taking of oral evidence, infringe constitutional rights. The second is whether they should be developed in such a way as to promote the spirit, purport and objects of the Bill of Rights and, if so, in what respects should the present situation be altered.

It is necessary for the purposes of this enquiry to identify the other provisions of the Bill of Rights that are potentially applicable to these questions. Two. are suggested. The first is contained in section 34 of the Constitution, which provides that:-

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

The central issue is the impact of this provision in regard to the question of onus and the procedural issues of the court’s reluctance to order discovery or oral evidence. Does the present situation infringe the right to a fair hearing? Related to that is the question whether it infringes the right to equal protection and benefit of the law under section 9(1) of the Constitution.

All of these issues are novel in the constitutional context. To that extent any answer proffered in what follows is necessary tentative and subject to revision. These are also in general terms areas of our constitutional jurisprudence that have received little attention from our courts and accordingly there are few signposts or beacons to guide the traveller in search of enlightenment. With that caution the journey must nevertheless be essayed. For the sake of convenience it is appropriate first to consider section 25 and the cluster of issues surrounding it.

### 3 **THE ASSOCIATED SHIP AND S25(1) OF THE CONSTITUTION:**

For all practical purposes the constitutional issues can be analysed on the basis that a constitutional challenge will emanate from the owner of an associated ship, or possibly a minority shareholder in the company owning the associated ship. Save for that latter instance the

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<sup>23</sup> *Tregea v Godart* 1939 AD 16

constitutional questions can be dealt with on the basis that the party raising the constitutional point will be a company that owns a ship that has been arrested as an associated ship. Almost certainly that company will be a *peregrinus*, that is, a company incorporated in a jurisdiction other than South Africa. The shareholders of the company will be persons who are not either citizens of South Africa or resident in this country. In most, but not all, instances the claimants will likewise be *peregrini*.

Turning specifically against that background to the provisions of section 25 an initial question is whether a company incorporated in a foreign jurisdiction is a bearer of rights for the purposes of this provision of the Bill of Rights. That involves two questions. The first is whether it is open to a juristic person such as a company to invoke the rights contained in section 25(1) of the Bill of Rights. The second is whether the answer to that question alters if the juristic person in question is a *peregrinus*.

The first question is to be answered in the light of the provisions of section 8(4) of the Constitution, which provides that:

‘A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.’

Are the rights conferred by section 25(1) available to juristic persons? Fortunately that is not a question that requires elaborate consideration because the Constitutional Court has already answered it in the affirmative.<sup>24</sup> It is submitted that this was an inevitable response to that question. If a juristic person is not entitled to the protection of the property clause in the Bill of Rights it is difficult to think of a provision that would be available to it.

The only possible doubt is whether that constitutional protection extends to a juristic person that is neither incorporated in South Africa nor conducts business in this country, save for the

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<sup>24</sup> *First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of South Africa Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), paras. [41] to

fortuitous circumstance that the vessel that it owns has visited a South African port and thereby become vulnerable to arrest in this country? It is submitted that the answer to this question must be in the affirmative. There are two reasons why this is so, one textual and the other based on a broader policy understanding of the purpose of the right conferred by section 25(1).

The textual reason flows from the fact that section 25(1) expressly provides that ‘no one’ may be deprived of property except in a situation contemplated by that section. Not only is that language broad and extensive but it fairly recognises that in a developed economy such as that of South Africa there will be persons, both natural and juristic, who have interests in property located in this country but who are not either citizens or even resident in South Africa. The Bill of Rights is careful to distinguish between those rights that vest in ‘everyone’,<sup>25</sup> and those rights that are vested in citizens alone.<sup>26</sup> The use of the word ‘no one’ is comprehensive and all-inclusive and there does not appear to be any basis for distinguishing a juristic person that is an *incola* from one that is a *peregrinus*.

The broader reason flows from the nature of the property right. As was said in the *FNB* case<sup>27</sup> companies are a universal phenomenon through which natural persons engage in a wide variety of legitimate activities. In today’s world it is difficult to conceive of meaningful business activity without the institution and utilisation of companies and to deny companies an entitlement to property rights would ‘lead to grave disruptions and would undermine the very fabric of our democratic State’. Those statements are as applicable to foreign juristic persons as they are to domestic juristic persons. South Africa has the largest economy on the African continent and one of the larger economies in the world.<sup>28</sup> It is heavily dependent on international trade and

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[45]. This will be referred to as the *FNB* case.

<sup>25</sup> For example, s9(1) 10, 11, 12(1), 14, 15(1), 16, 17 and 18 of the Bill of Rights.

<sup>26</sup> Such as political rights under section 19(1); the right to enter, to remain and to reside in the Republic in section 21(3) and the right to choose a trade occupation or profession freely in section 22.

<sup>27</sup> Paras. [44] and [45]

<sup>28</sup> It is the only African country to be a member of the G20 group of countries having the world’s largest economies and producing 90% of global gross national product and 80% of world trade. See the official G20 website at

welcomes the involvement of foreign corporations in business in South Africa. Apart from international investors<sup>29</sup> number of leading business enterprises in South Africa having a significant stake in the South African economy and generally regarded as South African businesses, are incorporated in other countries.<sup>30</sup> Studies in recent years in the field of economics and law have demonstrated the importance for a country's economic development of the Rule of Law and the appropriate protection of property rights. All of this supports a construction of section 25(1) that includes all juristic persons, whether they are *incolae* or *peregrini*.

Accepting then that section 25(1) is available to be invoked by the owner of an associated ship and that:-

‘... ownership of a corporeal movable must - as must ownership of land - lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of s25.’<sup>31</sup>

two questions then arise. The first is whether the arrest of the vessel as an associated ship involves a deprivation of property in terms of section 25(1). If that is answered in the affirmative the second is whether such deprivation is arbitrary. It is to these that we must now turn.

(a) **Is the arrest of an associated ship a deprivation of property?**

A useful starting point is to consider the effect that the arrest of the vessel has insofar as its owner's therein are concerned. Firstly, it places the vessel in the care and custody of the Sheriff<sup>32</sup> and the owner is thereby precluded from using the vessel, either for the purposes of trade or for the purpose of placing it on a charter. Whilst the owner is not liable for the expenses incurred by

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www.g20.org.

<sup>29</sup> Virtually the entire motor industry in South Africa is foreign-owned albeit through South African subsidiaries.

<sup>30</sup> This is true of such well known businesses as Anglo American plc, SAB Miller plc, Old Mutual plc and SAPPI Limited, whilst BHP Billiton has substantial South African connections.

<sup>31</sup> *FNB*, para. [51]



the Sheriff in keeping the vessel in his or her custody and preserving it<sup>33</sup> the consequence of the arrest is that the vessel may potentially be sold in terms of section 9(1) of the Act. Not only would such a sale result in the owner losing its title to the vessel but in distributing the fund arising from such sale<sup>34</sup> the claim by the Sheriff to recover his or her expenses is preferent.<sup>35</sup> If at the time of its arrest the vessel is under charter or is carrying cargo the owner is likely to face claims from the charterer or from cargo interests. The only way in which the owner can avoid these consequences is by providing security for the claim, which security will be available for the purposes of execution if the action *in rem* commenced by the arrest of the vessel as an associated ship succeeds. Alternatively, if the arrest is a security arrest in terms of section 5(3) of the Act the security will be available for the purposes of execution at the instance of the claimant in the proceedings brought, either by way of action or by way of arbitration, against the ship concerned or its owner or charterer, once those proceedings reach finality. If the owner of the arrested vessel is unable to furnish such security the almost inevitable consequence is that, rather than permitting the vessel to lie in harbour under arrest, during which period its condition will deteriorate, an application for the sale of the vessel in terms of section 9(1) will be brought. Whilst the court has a discretion in regard to such a claim and it is one that is sparingly exercised *pendente lite* and where there is a reasonable prospect that the owner will be able to show that it has a defence to the arresting party's claim<sup>36</sup>, the risk that the vessel may be sold imposes a substantial burden upon the owner.

These consequences of the arrest of the vessel as an associated ship must be measured against the constitutional requirements for a deprivation of property. This was first dealt with in

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<sup>32</sup> Admiralty rule 21(1).

<sup>33</sup> *MT Argun : Sheriff of Cape Town v MT Argun, her owners and all persons interested in her and others ; Sheriff of Cape Town and Another v MT Argun, her owners and all persons interested in her and another* 2001 (3) SA 1230 (SCA), para. [18] to [22] and [29] to [32].

<sup>34</sup> S9(2) of the Act.

<sup>35</sup> S11(4)(a) of the Act

<sup>36</sup> The *MT Tigr v Bouygues Offshore and Another* 1998 (4) SA 206 (C); *MT Argun, supra*, para. [34].

the *FNB* case. The court pointed out<sup>37</sup> that the use of the expression deprivation may be misleading or confusing because it can create the impression that it inevitably refers to the taking away of property whereas that is not necessarily the case. Whilst the dispossession of all the rights, use and benefits that an owner enjoys in and to a corporeal movable is clearly an instance of deprivation it is not necessary to constitute a deprivation that the dispossession need go that far. In this sense deprivation is a far broader term than expropriation, which does involve a complete dispossession of the property expropriated. Whilst the *FNB* case did deal with a situation where the owner would be dispossessed entirely of its rights in and to the property concerned, it said that:-

‘In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.’<sup>38</sup>

This suggests that the Court was inclined to give a broad meaning to the concept of deprivation thereby largely shifting the focus in each instance where the point arises to the question whether the deprivation in question is arbitrary.

The Constitutional Court developed the understanding of what constitutes a deprivation in *Mkantwa v Nelson Mandela Metropolitan Municipality*<sup>39</sup>. It expressed the general position in the following terms:-

‘[32] In *First National Bank* (the *FNB* case) this Court held that the taking away of property is not required for a deprivation of property to occur. Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial inference or

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<sup>37</sup> Para. [57]

<sup>38</sup> Para. [57].

<sup>39</sup> *Mkantwa v Nelson Mandela Metropolitan Municipality and another; Bissett and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng and others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC).

limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.’

It follows that not every interference with or limitation upon the power of an owner to deal with their property will amount to a deprivation for the purposes of section 25(1) of the Constitution. This recognises the fact that we live in a regulated society and part of the task of government is to regulate the exercise of rights by people in society in such a way as to it seems appropriate. The judgment in *Mkantwa v Nelson Mandela Metropolitan Municipality* recognises this fact and appears to exclude conventional restrictions on an owner’s right to use their property such as planning regulations or provisions designed to regulate relationships between people in the community, such as noise control or pollution regulations. It is only where the interference with property rights or the limitation upon the exercise of those rights goes beyond the normal constraints to be expected in an open and democratic society that they will amount to deprivation.

Fortunately the facts of that case provide some indication of what will constitute a substantial interference or limitation on rights of ownership going beyond those normally to be expected in society. It was concerned with the provisions of section 118 of the Local Government: Municipal Systems Act 32 of 2000. That section provides that before property situated in a municipal area can be transferred the transferor must obtain from the municipality what is commonly referred to as a rates clearance certificate, but is in fact is a certificate confirming that all rates and other charges due to the municipality during the two years prior to the application years have been paid. Absent such a certificate transfer cannot be effected and in substance the local authority is vested with a right akin to a lien over the property in question. The court held that the imposition of such a burden on the property constituted a deprivation for the purposes of section 25(1) of the Constitution. Its reasoning was as follows:-

‘[33] It follows that owners cannot transfer their properties unless consumption charges due by people other than themselves and for which they are not liable have been paid. It was correctly pointed out that these laws do not literally require the owner to pay outstanding charges. The reality is, however, that if the person liable for the debt does not or cannot pay, the owner who wants to effect transfer must ... The payment must be made regardless of whether the owner is liable to pay. The provisions are not merely procedural. They are a substantial obstacle to alienation and constitute a deprivation of

property within the meaning of s25(1).’

This approach is consistent with that of the court in the *FNB* case. There the court was concerned with the entitlement of the Commissioner, South African Revenue Service, under section 114 of the Customs and Excise Act 91 of 1964 to exercise a lien over motor vehicles in the possession of a customs debtor in terms of lease agreements or suspensive sale agreements where the financial institution retained ownership of the vehicle as its security for the amounts owing to it in terms of the agreement. Not only did the section empower the Commissioner to exercise such a lien but, if the debt owing by the customs debtor was not satisfied the Commissioner was empowered to sell the vehicles and appropriate the proceeds to payment of the customs debt. The court in the *FNB* case held that this constituted a deprivation of property. It seems to follow that in any situation where a statute creates the position that a person’s property may be forfeit or taken to secure or discharge an indebtedness there is a deprivation of property falling within section 25(1). This is so even if the purpose of the deprivation is not to dispossess the owner of the property but to have coercive effect on the owner to pay the underlying indebtedness.

Against the background of those authorities it is submitted that the arrest of a vessel as an associated ship involves a deprivation of the property of the owner of the vessel. Whilst one is not dealing with a statutory lien to secure payment to governmental institutions, as in those cases, the impact of an associated ship arrest is similar to the impact of such a lien. A vessel is detained in respect of a claim for which its owner bears no prior liability. Unless the person against whom the claim originally lies either pays the debt or provides security for the claim the owner of the associated ship is confronted with a choice between providing security itself or almost certainly losing the vessel. In one sense it goes further than the rights granted to municipalities under section 118 of the Local Government: Municipal Systems Act, in that if the arrest is one in an action *in rem* against the associated ship it is that vessel and its owners who are rendered liable to pay a third party’s debt. There is more here than financial pressure to meet the claim. In an action *in rem* against the associated ship liability for the claim is asserted against the ship and its owner. Accordingly the effect of such an arrest is that the owner of the associated ship is deprived of its property within the meaning of that expression in section 25(1) of the Constitution. That satisfies

the first requirement for seeking constitutional relief. We turn then to consider the requirement of arbitrariness.

(b) **Is an associated ship arrest an arbitrary deprivation of property?**

In *FNB Ackermann J*, who gave the judgment of the Court, pointed out that in certain contexts arbitrariness only attracts a low level of judicial scrutiny satisfied by nothing more than the absence of bias and bad faith<sup>40</sup>, but said that this was inappropriate to the consideration of a constitutional property clause. Ackermann J also rejected the notion that the question of arbitrariness in section 25 is limited to a consideration of whether the particular deprivation lacks rationality in the sense of there being no rational connection between means and ends.<sup>41</sup> After engaging in a brief survey of international provisions he reached the following conclusion<sup>42</sup>:-

‘Having regard to what has gone before, it is concluded that a deprivation of property is ‘arbitrary’ as meant by s25 when the ‘law’ referred to in s25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:-

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right is something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the

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<sup>40</sup> Para. [62]

<sup>41</sup> Paras. [65] to [70].

<sup>42</sup> Para. [100]

deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by proportionality evaluation closer to that required by s36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s25.'

Helpful though this list may be in indicating in general terms what factors have to be taken into account in considering whether any particular deprivation of property is arbitrary, its terms are so general that they provide no more than an indication of the matters that must be investigated in order to answer that question. Three issues appear to be fundamental. Firstly there is the identification of the reason why the legislature has created the situation where the particular deprivation under consideration can occur and whether that deprivation properly fits that purpose. The second is the extent of the deprivation, the position being that the more extensive it is, the more compelling must be the justification therefor. Thirdly, where the deprivation arises from the existence of an indebtedness, and the party who stands to be deprived of their property is remote from that indebtedness, the *nexus* if any between that party and the indebtedness will be of fundamental importance. If there is no link between the indebtedness in question and the obligation to secure or pay that indebtedness failing which one may be deprived of property then it will be difficult to avoid the conclusion that the deprivation is arbitrary.

It is convenient to start with the second general enquiry because it is the simplest. To some degree the extent of the deprivation flowing from an associated ship arrest will vary depending on the response to the arrest. If it is a security arrest and security is provided promptly by or on behalf of the owner of the ship concerned, perhaps by a P&I Club, it may be minimal. For a short time the owner of the associated ship will be aware of constraints on its ability to use the vessel, although these may have little practical impact if the vessel is at the time in port, as will probably be the case, and discharging or loading cargo or taking on bunkers or some combination of similar activities. In those circumstances if security is provided by the owner of the ship concerned the vessel's operations may not be affected at all and the owner of the associated ship

will suffer little, if any, loss.

However, the harm occasioned to the owner of the associated ship may be considerably greater than this. The vessel may be delayed and claims may arise at the instance of cargo owners against the owner of the associated ship as carrier of that cargo. If the vessel is under charter the charterer may have a claim based upon delay. In order to avoid these possibilities the owner of the associated ship may itself have to provide security and will have to do so if the arrest is merely the commencement of an action *in rem* against the associated ship. The provision of security invariably comes at a cost that is not ordinarily recoverable. If disputes arise concerning the nature or amount of the security, the prejudice to the owner will increase accordingly. In the most extreme case where security cannot be furnished the prejudice is enormous. The vessel will be detained in port under arrest and will cease to be a viable commercial asset. In that case it is almost certain that the vessel will be sold and the proceeds held as a fund in Court for distribution among creditors, both direct and those with claims on the basis of it being an associated ship in relation to another vessel or other vessels. If held as security for a claim being pursued either before a Court or by way of arbitration, once those proceedings are terminated with a judgment or award in favour of the claimant, the claimant will seek to realise their security by selling the associated ship. In situations such as these where the vessel is sold the owner of the associated ship will be deprived entirely of the vessel with little likelihood of recovering anything from the proceeds of its sale.

On what basis then should the matter be approached from a constitutional perspective? As questions of the constitutionality of legislation cannot depend on the extent of the harm occasioned to a particular litigant by the application of the provision in question to its peculiar circumstances, it is submitted that the proper approach must be to consider the ordinary range of potential consequences of the provision. In other words one disregards consequences occasioned by circumstances peculiar to the particular litigant that raises the constitutional challenge, as these may be extreme or unusual. Of course if the circumstances of the person raising the issue of constitutionality fall within the ordinary range then they are but an exemplar of it. The constitutionality of a legislative provision cannot vary from one case to the next and should not

depend upon extreme or unusual circumstances. Whilst those may be helpful for the purpose of highlighting aspects of the legislation the more appropriate approach is to consider the ordinary scope of the provision and its likely impact on those affected thereby. The question of constitutionality is then measured against those realities. Extreme cases are either accommodated on the basis of the improbability that they will arise in practice or by way of interpretation and possible exception. They do not ordinarily dictate the overall constitutional legitimacy of a provision.

Following that approach the usual position in respect of the arrest of an associated ship is this. The arrest may be avoided entirely or may be lifted before there is any harm to the commercial operations of the vessel, but in some cases there will be commercial harm occasioned by delay while security is found. In other cases the arrest will continue because security cannot be established and almost invariably that will result in the vessel being sold. If the arrest serves the purpose of commencing an action *in rem* the owner of the associated ship will be liable for any judgment rendered against the vessel. If the owner provides security then that too will in commercial terms render it liable for any judgment, or where the arrest is a security arrest, for the judgment or award in respect of which security is sought.

There is therefore a range of potential consequences flowing from an associated ship arrest. Some may be relatively minor or even insignificant, but it is not unreasonable to approach the matter on the basis that the arrest of a vessel as an associated ship poses a significant risk to the owner of the associated ship that it will lose its vessel. In order to avoid that the owner is constrained to find or provide security for the indebtedness of a third party or procure that the third party secures the claim. An associated ship arrest therefore imposes potentially onerous burdens upon the owner of the associated ship including the risk of being deprived entirely of its property. In those circumstances cogent and substantial justification will be required if the deprivation inherent in the situation is not to be condemned as arbitrary.

That conclusion takes us back to the reasons for the enactment of the legislation; the goal sought to be achieved thereby and the connection between the legislation and the achievement of



that goal. It is here that the justification for the associated ship arrest discussed in Chapter 4 assumes the greatest importance. Where it is sought to justify the associated ship arrest merely on the grounds that its purpose is to align South African maritime jurisprudence with the provisions of the Arrest Convention, whilst addressing by way of extension a problem occasioned by attempts on the part of ship owners to avoid the sister ship arrest provided for in the Convention, it can be demonstrated that this is fallacious. The single ship company was no novelty when the Arrest Convention was concluded and, even more importantly, there is almost nothing to suggest that it has burgeoned in the way that it has, as a means to avoid sister ship arrests. Equally to suggest that structuring the ownership of a fleet of vessels through a number of one-ship companies taints the formation and operation of those companies with dishonesty or impropriety, is likewise fallacious. There are far too many legitimate business reasons for using this corporate form and this general structure for the purpose of engaging in commercial shipping operations for that charge to be established. The reality is that ship owners worldwide have increasingly found it convenient from a business perspective, with few commercial disadvantages, to operate fleets of ships on the basis that the ownership of the vessels will vest in one ship companies. In doing so it seems likely that they have been supported by the financial institutions that provide the finance to acquire and operate vessels and which secure their own position by way of mortgages. By insisting that each vessel in respect of which they provide finance be owned and operated by a one-ship company these institutions effectively limit the range of creditors that may pursue claims against the vessels, especially those that may enjoy a ranking higher than a mortgage. At the same time the financial institutions usually have sufficient financial clout to secure their own claims not only by way of mortgages over the particular vessel, but also by way of cross mortgages over other vessels in the fleet and by personal guarantees from the persons standing behind the shipping group. In this way they are able to obtain the best of both worlds. Their security extends to people and assets going beyond the vessel and its immediate owner and other creditors do not enjoy the same advantage.

The earlier examination of the reasons for and justification of the institution of the associated ship reveals that its true foundation lies in a considered policy choice by the legislature. That policy choice in turn affords legitimacy to the legislative measure. The policy

question was whether those who secure to themselves the benefits of scale and other benefits flowing from the operation of a fleet of vessels, should at the same time, by housing each vessel in a discrete company, be able to limit the range of assets to which ordinary creditors may have resort in order to secure payment of their claims? In answering that question the legislature was entitled to make, and indeed did make, a range of subsidiary choices reflecting underlying policy values. At the broadest level the policy it adopted was that it was desirable that creditors should be paid and that provisions should be put in place in the legislation that would facilitate their ability to procure payment. From the perspective of South African citizens and companies they are more likely to be claimants than debtors in relation to maritime matters and, as that is the case, it is legitimate for the South African legislature to assist them in recovering what may become owing to them. The legislature was entitled to ask whether the use of one-ship companies, where that corporate structure enables the owners of ships in respect of which claims arise to avoid liability for those claims, constitutes an exorbitant use of the advantages of separate corporate personality.

A consideration of the institution of the associated ship itself demonstrates that in introducing it the legislature adopted a firm policy stance in favour of claimants; in favour of the payment of claims and in favour of the view that the use of one ship companies, where the device of separate corporate personality results in claims not being paid by those who benefit from such separate corporate personality, is exorbitant and unacceptable. As the principal author of the Act put it in his submissions to the then Appellate Division in *The Berg*<sup>43</sup>, the purpose of the Act is to make the loss fall where it belongs by reason of ownership of the vessels, and in the case of a company, ownership or control of the shares of the company. With the amendments effected to the Act in 1992 this latter becomes control of the company itself, rather than control of its shares. Overall the underlying notion is that where there is a common *locus* of control of two or more vessels, whether directly or through companies, the person or persons who exercise that control should accept that any debts incurred in respect of any one of those vessels should be paid, failing which all such vessels will be available to claimants seeking to recover the amounts owing to

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<sup>43</sup> *Euromarine International of Mauren v The Ship Berg* 1986 (2) SA 700 (A) 712A

them.

It can hardly be questioned that this is a legitimate view for the legislature to take. Ever since the establishment of the company as an institution, legal systems have found it necessary in certain circumstances to place a limit on the ability of the shareholders to enjoy the benefits of corporate personality. In some instances this is to prevent fraud or similar cases of impropriety. In others, such as the consolidation of accounts in groups of companies, its purpose is greater transparency. In yet other cases its purpose may be greater efficiency in the collection of tax. Helping to secure that lawful debts are paid is clearly a legitimate governmental purpose. A measure directed at achieving that is legitimate. It hardly seems possible to argue the contrary.

Flowing from this conclusion there can be little difficulty with the notion that the means chosen by the legislature to achieve the statutory purpose are well directed to that end. Experience with the associated ship jurisdiction shows that it has proved effective<sup>44</sup>, particularly as a means of obtaining security for otherwise unsecured claims. Whilst some vessels arrested as associated ships have been sold, in by far the majority of instances security is provided and the ship continues about its ordinary business. No doubt within groups of ship owning companies inter-company adjustments are made that locate the indebtedness in the correct company or it is consolidated in group accounts. Sales of vessels arrested as associated ship most usually occur where a shipping group collapses. In that situation a sale of the vessels would in any event be likely to occur in the ordinary course irrespective of the existence of the associate ship jurisdiction. Whilst the existence of associated ship claims may notionally extend the list and amount of claims against a fund arising from the sale of a vessel, it is rare at the end of the day for such claims to receive any dividend. Put simply if the ship owning company is in a position to pay all its creditors and is trading successfully it is unlikely that its owners and mortgagees will permit it to be sold. If it is not then it is likely in any event that at some stage it will be arrested

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<sup>44</sup> The fact that a number of countries supported a variation on the associated ship arrest during the negotiations leading to the revisions of the Arrest Convention (Berlingieri, *op cit* 580-596) demonstrates its effectiveness as well as the extent of the perception that the one-ship company involves an exorbitant use of the legal concept of juristic personality and the separate corporate personality of companies irrespective of who owns or controls their shares.

and sold at the instance of direct creditors.

Overall therefore the means adopted by the legislature in pursuit of its policy goals seems to be well directed towards the achievement of those goals. In most instances they are unlikely to have the extreme result of the vessel being sold and the owner being deprived both of the asset constituted by the ship and the proceeds accruing from its sale. The deprivation constituted by the arrest will ordinarily result in a need to provide security for a claim - which may not necessarily be provided by the owner of the associated ship and may involve no financial disadvantage to it - and to that may be added such commercial disadvantage as may flow from any delay to the vessel occasioned by the arrest. On their face therefore the measures adopted by the legislature are reasonably proportionate to the achievement of its legitimate goals.

That brings us to the final question of the relationship or connection between the owner of the associated ship and the indebtedness incurred in respect of the ship concerned. In strict law, giving effect to the separate corporate personalities of the two ship owning companies, the answer would be that there is no connection. But the enquiry into arbitrariness goes beyond matters of strict legal form. The court is entitled to examine economic and social connections that may exist between the owner of the ship concerned and the owner of the associated ship. This emerges from a consideration of the different conclusions in the *FNB* case and *Mkwenta v Nelson Mandela Metropolitan Municipality*. In *FNB* the vehicles subjected to a customs lien were owned by a finance house having no connection at all with the customs debt sought to be recovered by the Commissioner, South African Revenue Service. That debt had not arisen from any activities to which the finance house was a party or from which it had benefited. The presence of the vehicles on the premises of the customs debtor was the factor that attracted the operation of the lien. The connection between the deprivation and the customs debt was therefore extremely tenuous and remote, if it existed at all. This is what led the Constitutional Court to hold that the deprivation was arbitrary.

By contrast in *Mkwenta* the charges in respect of which the municipality had the right to withhold a clearance certificate were in some instances, such as rates, liabilities of the owner of

the property, and in other instances related to services such as water reticulation, refuse removal and electricity supply provided to the property and its occupants. The provision of those services was accordingly intimately connected to the use of the property itself. Not only did the availability of these services enhance the value of the property but they may also have enhanced its rental value and thereby generated a direct financial advantage for the owner. The Constitutional Court held that these factors provided a direct link between the owner of the property and the right of the municipality to withhold a clearance certificate as an inducement to secure the payment of these charges. When taken in conjunction with the fact that the local authority acquired no direct claim against the property itself or its owner and that the clearance certificate could only be withheld in respect of debts less than two years old, the deprivation involved was held not to be arbitrary.

What then is the position in respect of the associated ship? The starting point is the conventional case of an associated ship where the vessel is part of a fleet of ships, large or small, all owned by one ship companies but under the ultimate control of a single individual. The three special cases identified at the outset of this discussion can be dealt with after considering the conventional paradigm. Indeed if the conclusion is that the deprivation involved in an associated ship arrest is arbitrary and thus unconstitutional the need to consider those cases separately will not arise.

In the conventional situation when one looks at the two companies as separate juristic persons distinct from their shareholders, which is the classic statement of corporate personality, they are of course distinct entities unrelated to one another. On that basis it is possible to say that there is no connection between the debts of the one and the existence and activities of the other. However, once one goes beyond that to an examination of the interests that benefit from the activities of the companies it transpires that they are necessarily the same, because the test for association is common ownership or control of the ships or ship owning companies. If both ships are owned by the same person, as in the classic sister ship situation, they are both assets of the same person and are, subject to issues of priority, equally vulnerable to the attentions of an unpaid creditor irrespective of which ship's operations gave rise to the claim. The effect of the

associated ship provisions is to create the same situation as would arise if the two vessels were in the same ownership where they are each owned by a company owned or controlled by the same person. The associated ship arrest as an institution proceeds from the premise that companies are merely the vehicles through which an individual exercises rights in and to the vessels and that the person who owns or controls the ship-owning companies is ultimately the beneficiary in financial terms of their operations. Hence the common use of the term 'beneficial owner' to describe that person.

Once viewed from this perspective it is clear that there is a relatively close relationship between the debt owed by company A, that owns the ship concerned, and the imposition of liability and the attendant risk of arrest on the associated ship, owned by company B. The approach of the legislation is that the individual X, who controls both companies, is the one to benefit when A does not pay its debts. In many instances also this is the person who benefited from the provision of goods or services or other transaction that gave rise to the debt in the first instance and is the person who benefits from the commercial operations of the vessel owned by A. The legislation accordingly proceeds on the footing that it is equitable for the assets of company B, that likewise operates commercially for the benefit of X, to be available to satisfy claims arising in respect of the ship owned by A.

A consideration of the key factors identified by the Constitutional Court as central to the enquiry regarding arbitrariness leads to the following result. The legislation has a clear and legitimate purpose that reflects and seeks to address concerns that are reasonably widespread in the international maritime world about the operation of vessels owned by one-ship companies. The underlying policy is that it is desirable that such structures should not be used to enable those who benefit from the operations of the ship-owning companies to avoid liability for debts incurred in respect of one of those companies on the grounds that the debtor company is separate and distinct from the other ship-owning companies in the group. The measure taken to achieve that purpose is properly directed at its achievement and is reasonably proportionate to it so that it is unlikely to cause undue hardship. Whilst there is some risk that the owner may be permanently deprived of its vessel, this is most likely to arise in cases where it and those interested in it are

already in precarious financial circumstances. Although the juristic entities involved are distinct, those who benefit from their activities are the same so that there is a close connection between the underlying indebtedness and the imposition of liability by means of an associated ship arrest. Overall it is submitted that these elements combine to dispel the suggestion of arbitrariness and that in principle the institution of the associated ship passes constitutional muster.

(c) **Special cases**

That conclusion requires that the three special instances identified earlier be considered taking each in turn.

(i) **Minority shareholders:**

The general case we have been considering proceeds on the footing that the company owning the ship concerned and the company owning the associated ship are controlled by the same person. In their original form the provisions of section 3(7)(a)(ii) of the Act identified the requirement for association as being ownership or control of the shares of the two companies concerned and not ownership or control of the companies themselves. It was held<sup>45</sup> that:-

‘The plain meaning of the words ‘the shares in the company’ in ss7(a)(ii) is ‘*all* the shares in the company’. Some of the shares in a company, even if they be the majority, are not ‘the shares in the company’. That interpretation accords with the policy of the Act regarding associated ships. An associated ship may be arrested instead of the ship in respect of which the maritime claim arose and it then becomes liable to be sold in terms of s9 of the Act. *The Legislature could never have intended that a person owning shares in the company which owns the alleged associated ship, but who is a stranger to the company which owns the ship in respect of which the maritime claim arose, should be deprived of his interest by its arrest as an associated ship.*’ (Emphasis added.)

One of the curious features of this statement is that when it was made<sup>46</sup> the legislature had

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<sup>45</sup> *Dole Fresh Fruit International Limited v m.v. Kapetan Leonidas* 1995 (3) SA 112 (A) 119B-D

<sup>46</sup> In March 1995

already<sup>47</sup> amended the section to bring about precisely the situation that the Court apparently thought could never have been its intention. That is now water under the bridge but the quoted passage does serve to identify the different dimension to the question of constitutionality that arises in the case of a minority shareholder who seeks to challenge the associated ship provisions as involving an arbitrary deprivation of her or his interest in the company owning the associated ship.

The point is not insubstantial. In a simple case one person, X, may control two ship owning companies, A and B, by way of ownership of 51% of the shares in each. The remaining 49% shareholding in the two companies is held by two entirely different people or groups with no overlap. By the arrest of the vessel owned by B as an associated ship in relation to the vessel owned by A, the minority shareholders in B are at risk of losing their interest in the vessel itself and effectively in the company B in its entirety. Such deprivation would arise in consequence of the debts of A in which they outwardly have no interest and with which they appear to have no connection. It is true that X controls both companies and is clearly connected to both the indebtedness of A and the vessel owned by B, but does that connection suffice to avoid a finding that the deprivation involved in permitting the arrest of B's vessel as an associated ship is arbitrary in relation to the minority interests in B? If that question is answered in the negative then the associated ship arrest provisions must be read more narrowly as including only cases where the entire shareholding in both A and B is controlled by the same persons.

The answer to the constitutional query is by no means clear-cut. It cannot be said that there is no connection between the indebtedness of A and the arrest of B's vessel. Plainly there is in the form of X's controlling interest in both companies. However, if the arrest is constitutionally permissible the minority shareholder or shareholders in B risk losing their interest in B and through it in the vessel it owns in consequence of a debt that on outward appearance may have been incurred without their knowledge or participation and the incurring of which does not enure for their benefit. Is this a hazard that they should be required to run as one of the risks attendant

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<sup>47</sup> From 1 July 1992.



upon being a minority shareholder?

As Ackermann J pointed out in *FNB* the question of arbitrariness requires one to explore a complexity of relationships. In that case it was a tripartite set of relationships, involving the existing debtor, the revenue service and the finance house that was the owner of the motor vehicles. The statutory obligation to pay the customs duties linked the customs debtor and the revenue service, but had no link to or connection with the finance house. In turn the finance house and customs debtor were linked in a contractual relationship by virtue of the provisions of the suspensive sale agreements in relation to the vehicles under which the finance house retained ownership of those vehicles. There was, however, no *nexus* at all between those agreements and the existence of the customs debt, nor were the vehicles an instrumentality in the creation of the customs debt. In the result there was nothing at all to link the deprivation imposed on the finance house to the obligation to pay the customs debt.

The web of relationships in the case at present under consideration in relation to an associated ship arrest is more extensive and more complex. Firstly there is the relationship between the creditor seeking the arrest and company A that owns the ship concerned. That may be contractual, delictual<sup>48</sup> or statutory in origin. Secondly there is the relationship that X has with A by virtue of her or his majority shareholding in the company. That relationship entitles X to dictate the affairs of A and the activities of the vessel it owns, including the activities giving rise to the debt in question. In addition X will be the primary beneficiary of the successful commercial activities of the vessel and hence of A. There is thus a significant connection between X and the existence of the indebtedness that may be seen as creating a level of obligation on the part of X to secure the payment of A's indebtedness to the claimant. Thirdly there is the similar relationship that X has with B in regard to its commercial activities. Very probably the fact that X is the majority shareholder in both A and B means that X will cause the vessels owned

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<sup>48</sup> Tortious in the terminology of the common law.

by A and B to operate in a way that produces cost advantages<sup>49</sup> and where possible productive trading synergies.<sup>50</sup> This may create an operational linkage between the two companies, A and B, apart from that provided by X's common controlling shareholding. Fourthly there is the complex of relationships between the minority shareholders of B and B itself. These are unlikely to result in the minority shareholders having any significant say in the operations of the vessel owned by B or over matters such as the appointment of agents, the commercial activities of the vessel and the like. Lastly, there is the relationship between majority and minority shareholders, which may have its own regulatory scheme, such as a shareholders' agreement, although experience suggests that this is not common.

Two points should perhaps be made at the outset. The first is that in principle the extent of the minority shareholding should not affect the question of constitutionality. There is a natural tendency to suggest that the deprivation is more likely to be regarded as arbitrary the greater its extent, so that a 49% minority shareholder is more likely to succeed in raising the constitutional issue than one holding only 1%. It is submitted, however, that this amounts to nothing more than a plea *ad misericordiam* and should be resisted. A deprivation of property does not become more arbitrary because the person deprived had a greater stake in the company nor does it become less arbitrary if their stake is small. The nature of the deprivation is the same in both cases even though the extent may differ. Of course in a situation where the court is considering a deprivation that is always relatively minor in extent the prospect of its being condemned as arbitrary will diminish. However, that is a different matter from the situation where the nature of the deprivation remains the same, but one person may lose a lot thereby and another a little. The matter can be tested by a situation where there are two minority shareholders, one owning a 45%

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<sup>49</sup> Cost advantages may accrue from common management, the use of the same agents in different ports, group entries with a P&I Club, simplification of crewing and maintenance activities, the use of the same chartering brokers and the exploitation of economies of scale. No doubt there are other examples.

<sup>50</sup> Much here will depend upon the size of the fleet, the nature of the vessels and the nature of the commercial activities undertaken in respect of the ships. However, it may mean that there is a substitute vessel is available when one is damaged or delayed or that great flexibility is feasible when charterparties are concluded on a 'vessel to be nominated' basis. The opportunities for trading synergies are greater where a liner or similar service is in operation and the larger the group of ships operated as part of a single fleet the greater the potential to achieve such trading

stake in company B that owns the associated ship and another 4%. It cannot make a difference to the question of the constitutionality of the deprivation suffered by the arrest of the vessel owned by B as an associated ship whether the challenge is raised by the shareholder owning 45% or the one owning 4%.

The second point is that one ship companies are invariably private companies<sup>51</sup>, so that where there is a diversity of shareholding it is unlikely that this will be constituted by people having little or no connection with one another save for their common shareholding in the company.<sup>52</sup> This is a fundamental distinction between a private company and a public company. In practice where there is a diversity of shareholding that is usually due to one of three possible underlying sets of relationships. The first and the most common is a familial relationship where the family's business interests lie in the shipping industry and have usually been built up over a number of years. There are many groups of shipping companies that were founded by a single individual or perhaps brothers, who brought his or their sons into the business, and then, in turn, the sons involved their own children. Of course there are variations where wives and cousins and other members of the family also become involved in what is in substance a family business. In those circumstances it is unusual for all the family to be active participants in the day to day management of the business, but it is not uncommon for them to have shareholdings to differing

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synergies.

<sup>51</sup> Adopting the South African distinction between a private company, the membership of which must be limited to 30, and a public company where the shareholding will run into hundreds if not thousands.

<sup>52</sup> I have encountered a single instance of this in the maritime world, in the context of an attempt to obtain an associated ship arrest, where a company acting as manager of a fleet of ships would, in its capacity as manager, not only operate the vessels but also decide what operations should be undertaken, which ships should be disposed of and which acquired and when such acquisition should be made. Each time there was an acquisition a new one ship owning company would be created. The manager would take a stake in that company, usually ranging between 9% and 15%, and would then actively seek out investors to acquire the remaining shares in the company. These investors would be people wishing to make an investment in the shipping industry but having no other means to do so were willing to entrust their investment to the ship manager. They were solicited by various means, usually through agents, on each occasion when a new vessel was acquired for the fleet and no particular connection existed among the investors. They were all passive investors seeking a return on their investment but having no active involvement in the operation of the vessels or the companies, all of which was firmly vested in the hands of the ship managers. It is debatable whether in this situation the separate ships making up the fleet are associated ships within s 3(7) of the Act, but assuming that they are, this is a rare instance of the minority interests in the company owning the ship concerned and the minority interests in the company owning the associated ship having no connection or linkage with one another and as a result no link with the other ship-owning company.

extents in various ship-owning companies.<sup>53</sup> The relationships will, however, be relatively close and the group of companies owning the vessels in the fleet will be operated as a single entity for the benefit of the family as a whole.

The second possible set of relationship is one where persons who are employed by a company responsible for managing the affairs of the fleet are given a small shareholding in some or all of the ship-owning companies as a reward for and inducement of loyal service. It is not uncommon for the group of ship-owning companies to be managed by a company forming part of the group and under the same overall control. Senior employees in the management company may then be rewarded for their services with small stakes in one or more of the ship-owning companies or may be assisted or enabled to acquire such stakes. In those circumstances the relationship between minority and majority shareholders remains largely one between employer and employee. Unlike the family situation the minority shareholder and employee will also be involved in the operation of the vessel and indeed in the operation of all the vessels in the fleet.

The third possibility is one where the majority shareholder involves selected business associates in the business as minority shareholders in the ship-owning companies. This is not a case of soliciting outside investors from the general public. It is rather the involvement of outsiders, very often people within the majority shareholder's circle of friends and business acquaintances, as participants in the business. Such situations usually reflect close personal and business relationships rather than remote investment participants. It must be borne in mind that relationships such as these depend from the outset on the majority shareholder's invitation to participate. If successful, over time the relationship may extend so that it arises in relation to the ownership of a number of different vessels. In the context of a private company such relationships can, as our courts have often pointed out, assume a form closely akin to partnership,

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<sup>53</sup> These shareholdings may represent what is perceived to be their own interest in the family business or may be nominee shareholdings on behalf of the family as a whole to be transferred as business interests may dictate. Identifying whether a shareholding is a genuine reflection of that person's interest in the company or whether it is a nominee shareholding is usually impossible from the public records of the company. Since the advent of the associated ship jurisdiction there is anecdotal evidence among maritime lawyers in South Africa of ship-owning families deliberately adjusting the shareholdings of family members in different one-ship companies, with a view to

rather than the more remote involvement that minority shareholders have in, for example, a public company.

From the constitutional perspective there can be no doubt that it is how the court views this potential range of relationships that will be decisive of the claim by a minority shareholder that the arrest of the associated ship is an arbitrary, and therefore unconstitutional, deprivation of property. As said at the outset of this discussion the position cannot be said to be absolutely clear-cut, but it is submitted on balance that such a constitutional complaint should fail. There are four reasons for saying this. Firstly the existence or otherwise of minority shareholders does not affect the legitimacy of purpose of the arrest and in general the proposition that it is an appropriate, effective and proportionate means to adopt to achieve the purpose of ensuring that legitimate claims are met. Secondly there is a clear and indisputable *nexus* between the debt arising in respect of the ship concerned and the common majority and controlling shareholder in both companies. Thirdly it is reasonable to anticipate that in almost every instance the minority shareholding will have come into existence in one of the three sets of circumstances delineated above and in all of those there is a close connection between the minority and majority shareholders and a likelihood that the former may have an interest in the operation of the group of ship-owning companies as a whole and in the financial health of that group. Lastly, one of the accepted hazards of being a minority shareholder in a private company is that the risks attendant upon the operation of the company will be created by the decisions and actions of the majority shareholder. Unlike the case with public companies, particularly those listed on a stock exchange, where the minority shareholder is usually capable of disposing of their interest in the company, a minority shareholder in a small private company cannot easily exit the company if they dislike or disapprove of the business decisions of the majority shareholder. Generally speaking they find themselves restricted to persuasion and advice in regard to operational matters in the decision-making processes of the company, rather than enjoying any substantial decision-making power. Accordingly by procuring and maintaining a minority share in a ship-owning company they necessarily bind themselves to accept the risk that the actions of the majority shareholder may enure to their detriment and the detriment of their investment. If they do not stipulate for

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contending that they are not associated ships, albeit operated as part of a single fleet.

appropriate protection either through the founding documents of the company or by way of a shareholders' agreement, it is not unfair that they should be burdened by the risks inherent in their position.

The question whether a particular deprivation of property is arbitrary involves the balancing of a variety of interests. Courts do not lightly condemn the activities of legislatures as arbitrary where they reflect policy decisions and reasonably proportionate steps to give effect to those decisions. Persons engaged in the shipping industry on an international basis are aware that in various jurisdictions there are differing rules in regard to the arrest of ships pursuant to claims. Accordingly minority shareholders are in a position to inform themselves of the legal position in regard to associated ship arrests in South Africa, which features prominently as a centre of maritime litigation. They will be aware that the vessel in which they have a stake operates as part of a fleet of other vessels and will also be aware that the majority shareholder in the company in which they hold shares also controls other ship-owning companies. Accordingly they have the means to inform themselves of the risks they run if any of those vessels visits South African waters. They have means to protect themselves by way of agreements with their majority shareholders. Having taken upon themselves the advantages accruing from ownership of the minority shares in the ship-owning company it does not seem arbitrary that they should also bear the risks attendant upon that situation and the absence of control over the company that it carries with it. For those reasons, it is submitted that a constitutional challenge to the associated ship arrest by a minority shareholder should fail.

(ii) **The Heavy Metal**

It is unnecessary for the purposes of considering the constitutional dimension of this judgment to rehearse the facts of the case as they have been sufficiently discussed earlier in chapter 7. The key aspect from the perspective of the Constitution is the interpretation given in the majority judgment to the expression 'power, directly or indirectly, to control the company' as embodying two distinct sources of such power. The effect of this as the majority judgment acknowledges is that there may be situations in which there is in fact no commercial or business

connection between the two ship-owning companies. The only link will be the fortuitous one that the persons controlling those companies happen to have made use of the same nominees as shareholders and/or directors of the companies. On the basis of the majority judgment there will nonetheless be an association between the two vessels rendering the one subject to arrest in respect of the debts incurred in respect of the other.

It is submitted that the constitutional position in this situation is clearer and simpler than the case discussed in the previous section. In the absence of any commercial connection between the two companies as a matter of fact the justification for the entire institution of the associated ship is absent. As this is a key element in the constitutional analysis the absence of the central justification for the ability to arrest an associated ship immediately casts doubt on the constitutional validity of the construction adopted by the majority especially when there is a wholly plausible construction that avoids the problem and maintains that central reason for the existence of the institution. None of the reasons of policy that apply to the situation of the minority shareholder are of application in this situation. There is simply no link between the indebtedness incurred in respect of ship A by company X and ship B owned by company Y other than the common nominee shareholder and/or director. There can be no question in this case of making the loss lie where it ultimately belongs by virtue of ownership or control of the two ships because of the absence of any commercial link between them. It is a naked case of making A liable for the debts of B without any commercial justification for doing so.

The justification proffered by the majority judgment for its conclusion that this state of affairs did not affect its conclusion as a matter of interpretation is that if people seek to hide their involvement in corporate entities by having resort to nominee shareholders and directors then any problems occasioned thereby are as a result of their own activities and capable of being avoided by the expedient of ordering their affairs on a different basis<sup>54</sup>. However once it is accepted that it

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<sup>54</sup> *Heavy Metal*, para [16] The judgment cites a passage from *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) 485C in support of this proposition but the passage in question identifies an inequity in permitting an associated ship arrest when the person controlling the ship-owning companies has gone to the trouble of arranging his affairs so that the vessels are not associated ships. It provides no support for the proposition for which it is cited.

is permissible and entirely acceptable commercial practice for nominees to be used - and it is difficult to see on what basis of principle such a well-established and widely-used institution could be subjected to blanket condemnation and dismissed as impermissible - then it is not feasible for the shipowner wishing to register a vessel in a one-ship company using a nominee shareholder can ever be certain that there are not other vessels in relation to which it will be an associated ship. Indeed if the company is incorporated in one of the well-known jurisdictions for ship registration, such as Panama, Liberia or Cyprus, the probabilities are overwhelming that there will be other ship-owning companies that have the same nominee shareholders and possibly the same directors. In other words the belief that these problems can be avoided is ill-founded once resort is had to nominee shareholders.

Earlier in considering the effect of the Constitutional Court's judgment in the *FNB* case the view was expressed that where the deprivation arises from the existence of an indebtedness and the party who stands to be deprived of their property is remote from that indebtedness, the *nexus* if any between that party and the indebtedness will be of fundamental importance. If there is no link between the indebtedness in question and the obligation to secure or pay that indebtedness failing which one may be deprived of property then it will be impossible to avoid the conclusion that the deprivation is arbitrary. It is submitted that the majority judgment in the *Heavy Metal* inevitably drives one to the conclusion that it contemplates with equanimity arbitrary deprivations of property. That is not to say that in all instances to which the judgment applies, or even on the facts of that particular case, there will be an arbitrary deprivation of property falling foul of the constitutional protection afforded by section 25 of the Constitution. As is apparent from the judgment of Marais JA, with which the majority agreed, there was much to be said for the proposition that the case could have been disposed of on the basis of its own facts without the need for the court to adopt the construction of the majority. However for the purpose of considering the interpretation of section 3(7)(b)(ii) of the Act the question must be approached on the basis of comparing an interpretation that cannot result in the arbitrary deprivation of property and one that can. The requirement that the court should favour an interpretation that leads to a constitutionally compatible result over one that is capable of leading to a result that infringes a right protected under the Bill of Rights leads inexorably to the conclusion that the construction of



this section favoured in the majority judgment is not constitutionally permissible. It is submitted that a challenge to this construction would be permissible even within the narrow limits imposed upon our courts by the *stare decisis* rule<sup>55</sup>. The rule cannot be permitted to perpetuate an erroneous construction in contravention of the Constitution<sup>56</sup>. There is no reason to believe that the error should be perpetuated on the grounds that people have ordered their affairs taking account of the erroneous interpretation. The proper construction is favourable to shipowners and would, if anything, ameliorate the stringency of the associated ship jurisdiction.

(iii) **The section 1(3) presumption.**

A potential constitutional difficulty is occasioned by the presumption in section 1(3) of the Act that:-

‘For the purpose of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.’

The primary instance in which this presumption will apply is where the demise charterer has, during the currency of the charter, incurred debts relating to the chartered vessel. The presumption has the effect of rendering the chartered vessel liable to arrest in respect of those debts. To that extent it reflects the principle that for certain purposes the demise charterer is to be regarded *pro hac vice* as the owner of the vessel.<sup>57</sup> However, the presumption<sup>58</sup> appears on its

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<sup>55</sup> *Bloemfontein Town Council v Richter* 1938 AD 195 at 232, viz: ‘The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors - such preference, if allowed, would produce endless uncertainty and confusion. The maxim ‘*stare decisis*’ should, therefore, be more rigidly applied in this the highest Court in the land, than in all others.

<sup>56</sup> I leave aside for the present the question whether the *stare decisis* rule in this stringent form can itself survive constitutional scrutiny. It has been cited as an important element of the Rule of Law by the Constitutional Court itself in *Gcaba v Minister of Safety and Security* [2009] ZACC 26, paras [58] to [62].

<sup>57</sup> D J Shaw, *Admiralty Jurisdiction and Practice in South Africa*, 33, footnote 53 and the cases there cited.

<sup>58</sup> Inserted by section 10 of the Sea Transport Documents Act, 65 of 2000, with effect from the 20<sup>th</sup> June 2003.

plain language to go further than that<sup>59</sup> and to permit the arrest of the demise chartered vessel as an associated ship in respect of the debts of a ship-owning company controlled by the demise charterer. This occurs if the range of operation of the presumption is extended to sections 3(6) and (7) of the Act. Thus if X, the demise charterer, controls a company that owns vessel A, in respect of which debts have been incurred, and through another company demise charters vessel B, for the duration of the demise charter the latter vessel will be liable to arrest as an associated ship in relation to A. The difficulties that such a construction can create have been noted by one commentator<sup>60</sup>. He wrote:-

‘In regard to demise charters, s1(3) of the Act provides that for the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise. Having regard to the wide wording of this section, the deemed ownership of a ship would appear to be applicable not only to the ship concerned but also to the issue of association. Unless s1(3) is restrictively construed to apply only to claims *in rem* against the ship concerned in respect of which the charterer is liable, the section has far-reaching results. Thus on a literal construction, the real owner of the ship who charters it by demise runs the risk of it being arrested by reason of the charterer having at some stage, possibly even before the conclusion of the charter, having attracted liability in respect of another ship, either owned or chartered by demise by the charterer. It seems unlikely that this was contemplated.’

The section has been considered by a court in an unreported decision<sup>61</sup>. The judgment does not go beyond citing the passage from Hofmeyr’s work quoted above and agreeing that to apply the presumption in section 1(3) in the context of an issue of association would have far-reaching results probably not contemplated by the legislature. In the result the court construed the provision of the section as applying only to the case of an action *in rem* against the chartered vessel consequent upon a debt incurred by the demise charterer during the course of the charter. The judge also agreed with the proposition that had it been intended that this presumption should

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<sup>59</sup> And further than the presumption in section 3(7)(c) which renders other ships owned by the demise charterer or owned by companies controlled by the demise charterer, liable to arrest as associated ships.

<sup>60</sup> G. Hofmeyr, *Admiralty Law and Practice in South Africa*, 74.

<sup>61</sup> *MV ‘Pacific Yuan Geng’: KP7 International SA and others v Glory Wealth Shipping (Pte) Ltd*, AC 30/2009 (WC) Shipping Cases of South Africa C 176. This judgment was followed with a rather fuller analysis in *The Chenenbourg: Lauritzen Bulkcarriers A/S v The Chenenbourg: The Cape Gulf: Maple Maritime Inc v E.A.S.T International Ltd* Shipping Cases of Southern Africa C183.

apply in relation to issues of association that would have been said expressly or some amendment would have been effected to sections 3(6) and (7) of the Act to make it clear that the presumption was applicable in that context as well. Accordingly the arrest of the demise chartered vessel as an associated ship as security for a claim against the demise charterer in respect of another vessel was set aside.

The reasoning of the court in that case was relatively terse, no doubt because of the urgency of the matter. However, its conclusion seems to be correct. There are two reasons for this, the one being that it accords with the result of a conventional process of interpretation and the other being that the alternative construction offends against the constitutional prohibition on the arbitrary deprivation of property. First the issue of interpretation. This takes place against the background that section 3(7)(c) of the Act already contains a presumption that the charterer or sub-charterer of a ship shall be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the sub-charterer is alleged to be liable. If section 1(3) is construed as applying in the context of the associated ship then, in relation to a demise chartered vessel, it overlaps with the presumption in section 3(7)(c) in circumstances where the chartered vessel is the ship concerned. This overlap gives rise to a number of difficulties.

The first difficulty is that section 1(3) applies only to a charter by demise, whereas section 3(7)(c) applies to time and voyage charters as well. That immediately suggests that the two presumptions are directed at different situations. Secondly, the presumption in section 3(7)(c) is clearly directed at the question of association in that it deems the charterer to be the owner of 'the ship concerned' that is the ship in respect of which the maritime claim that forms the subject of the action arose. Its purpose is therefore to provide a foundation for the arrest of another ship. By contrast the presumption in section 1(3) is designed to enable the demise chartered vessel to be arrested. Thirdly, the presumption in section 3(7)(c) is confined to maritime claims for which the charterer or sub-charterer, and not the owner of the vessel, is alleged to be liable. No such limitation is embodied in section 1(3). Fourthly, there is the constraint that the deeming in section 1(3) applies only to the period of the charter by demise. That seems to be a narrower time frame than is contemplated by the reference to a ship being the subject of a charterparty 'at any time' in

section 3(7)(c).

These differences and potential contradictions between the two deeming provisions, as well as the fact that section 3(7)(c) is located in the statute as part and parcel of the associated ship provisions, whilst section 1(3) stands in the preliminary section of the Act and deals generally with an action *in rem*, without reference to an associated ship, suggests that the two presumptions are directed at different ends. In order to discern those ends it is necessary to have regard not only to the ordinary meaning to be attached to the wording of the presumption but also to the context in which they appear and the apparent purpose that section 1(3) serves when viewed in the light of the Act as a whole. However, as has been stressed in other cases, words cannot be taken in isolation but must be read in the light of the subject matter with which they are concerned and it is only when that is done that one can arrive at the true meaning of a statutory provision.<sup>62</sup>

There can I think be little doubt that section 1(3) is patently intended to deal with the situation where a demise charterer incurs debts in respect of the operation of the demise chartered vessel. The effect of a demise charter is that the charterer is responsible for the operation of the vessel. It will appoint the master and the crew and be responsible for provisioning the vessel, supplying bunkers, appointing agents and all matters relating to the operation of the vessel. In those circumstances it is relatively easy for persons making supplies to the vessel to be left with the impression that they are dealing with the vessel's owner. However, if their claims are not paid they will not ordinarily be able to have resort to an arrest of the chartered vessel in order to pursue their claims. Section 1(3) alters that situation.

The proper question is whether section 1(3) goes any further than rendering the demise chartered vessel subject to arrest in respect of claims against the demise charterer arising during the period of the charter by demise. If the question of interpretation is posed on that basis the answer is that there is no compelling reason either of policy or in the structure of the Act itself

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<sup>62</sup> *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) 941D-E; *Bastian Financial Services (Pty) Limited v General Hendrik Schoeman Primary School* 2008 (5) SA 1(SCA) paras. [18] and [19].

that requires the presumption in section 1(3) to be applied not only to that situation but also so as to render the demise chartered vessel susceptible of arrest as an associated ship. Accordingly a consideration of the context of the provision in the light of the Act as a whole favours a construction section 1(3) does not apply in the context of the associated ship provisions of section 3(6) and (7). In other words it applies to an action *in rem* brought under section 3(5) of the Act but not to an action *in rem* brought by the arrest of an associated ship in terms of section 3(6) of the Act.

Consideration of the constitutional problems posed by the alternative construction of section 1(3) puts the issue beyond doubt. If the 'literal' meaning is pursued to its ultimate conclusion the situation that it creates is the same as that which arises by virtue of the judgment in the '*Heavy Metal*' discussed in the previous section. The owner of the demise chartered vessel will find that their vessel is subject to arrest and potential sale consequent upon debts incurred by the charterer in relation to some other vessel with which the owner of the demise chartered vessel has no connection whatsoever. The only link between the owner of the demise chartered vessel and the debt will be the fortuitous one that it has chartered its ship to the person responsible for that debt. However, the commercial connection between them arises from the demise charter and not from any interest or relationship that the vessel's owner may have with the vessel in respect of which the claim arose. For the reasons already expounded earlier that construction is in conflict with the constitutional bar on the arbitrary deprivation of property. That necessarily leads to the conclusion that the narrower construction of section 1(3) as applying only to claims against the demise charterer in respect of the demise chartered vessel is correct. Only in that way can the constitutional difficulty be avoided.

The constitutional position is different when section 1(3) is applied in relation to claims against the demise charterer arising from its operation of the vessel pursuant to the charter. True it has the effect that a vessel X, owned by A, can be arrested in respect of the debts of B. However, the context in which those debts arise is that B has complete control over the operation of vessel X and the debts have been incurred in the course of those operations. At the same time A has benefited from the trading activities of B in respect of the vessel in that it has received the

hire in terms of the demise charterparty. In those circumstances there is a close commercial link between the benefit accruing to A and the activities that led to the debt being incurred by B. A's position in that situation bears some similarity to the position of the minority shareholder discussed earlier. Having regard to the purpose of the presumption and the nature of the relationship between owner and demise charterer it is suggested that section 1(3) will withstand constitutional scrutiny if it is confined to this narrower sphere of operation.

#### 4 **PROOF OF ASSOCIATION, FAIR HEARING AND EQUALITY.**

In Chapter 5 the difficulties confronting a claimant seeking to arrest an associated ship in proving the association were dealt with in some detail. In summary the courts have held that it is necessary to prove an association on a balance of probabilities. This confronts the applicant for an arrest with a need to establish in their application papers the facts demonstrating the association. This is so even though the fact of association is an integral part of their cause of action and hence their claim when the arrest is sought in order to commence an action *in rem* against the associated ship. If anything it is the most vital element of that claim as it is determinative of the existence of liability on the part of that ship and its owners. The task of proving the association is complicated by the relative inaccessibility of the key information required to demonstrate the identity of the person or persons who control the two ship-owning companies. This would matter less if the courts were willing to permit discovery or to refer applications for the hearing of oral evidence or to trial. However, the overwhelming balance of authority is hostile to the court adopting that course. In the circumstances an applicant for arrest is confronted with the heavy burden of proving a disputed matter on a balance of probabilities on the papers when it has no direct access to the relevant information and may well be confronted with the withholding of information, disingenuousness and downright dishonesty. What needs to be considered is whether this raises a constitutional issue and if so under what head and with what consequences.

The starting point is the onus of proof imposed upon the applicant for arrest. This can raise constitutional issues. It was considered by the Constitutional Court in *Prinsloo v Van der Linde*

*and Another*<sup>63</sup> a case involving a forest fire in the context of the presumption in section 84 of the Forest Act<sup>64</sup> that where in any action the question of negligence in respect of a forest fire arises ‘negligence is presumed, until the contrary is proved’. The challenge was based solely upon the equality provisions of the Interim Constitution that have their equivalent in section 9 of the Bill of Rights under the Constitution and in particular the right to equal protection and benefit of the law. It is important to note this at the outset as it served to limit the enquiry undertaken by the Court. The majority judgment<sup>65</sup> expressly said that the Court was not concerned with the question whether there is a constitutional right to a fair civil trial and, if so, whether an onus provision such as that provided for in section 84 of the Forest Act might infringe such right.<sup>66</sup> That statement was made in the light of the fact that the Interim Constitution’s equivalent to section 34 of the Constitution<sup>67</sup> did not guarantee the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum, but merely guaranteed the right of access to a court or other tribunal. The court was accordingly not concerned with the potential interplay between that right and the right to equality embodied in section 9, whilst that is now important in considering the possible constitutional questions that can arise in relation to an associated ship arrest.

Reverting simply to the incidence of the onus and the issue of equality before the law the majority judgment drew attention to the distinction between the onus of proof in civil and criminal cases, and cited with approval a decision<sup>68</sup> which pointed out that in criminal cases the presumption of innocence demands that the burden of proof should rest on the prosecution to

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<sup>63</sup> 1997 (3) SA 1012 (CC)

<sup>64</sup> Act 122 of 1984

<sup>65</sup> A judgment of Ackermann, O’Regan and Sachs JJ.

<sup>66</sup> Para. [9] at 1019E.

<sup>67</sup> S22 of the Interim Constitution.

<sup>68</sup> *Mabaso v Felix* 1981 (3) SA 865 (A) 872G-H.

prove the guilt of the accused beyond reasonable doubt:-

‘But in civil law ... considerations of policy, practise and fairness *inter partes* may require that the defendant should bear the overall onus of averring and proving an excuse or justification for his otherwise wrongful conduct.’<sup>69</sup>

There is no golden thread running through the civil law that fixes immutably the onus of proof and the position is that:-

‘... all rules dealing with the subject of the burden of proof rest ‘for their ultimate basis upon broad and undefined reasons of experience and fairness.’’<sup>70</sup>

Accordingly the majority held that so long as the rules relating to onus are rationally based no constitutional challenge could arise in terms of the equality provisions of the Constitution.

The question of the onus of proof was dealt with in rather more detail in the separate concurring judgment of Didcott J. He cited<sup>71</sup> the following passage from Wigmore on *Evidence*:-

‘Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidents of this risk? By no means. ... The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations. ... There is ... no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.’

Didcott J endorsed that general statement as being applicable in the South African context and went on to say<sup>72</sup>:-

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<sup>69</sup> Quoted in para. [37] of the majority judgment.

<sup>70</sup> *Pillay v Krishna and Another* 1946 AD 946 at 954.

<sup>71</sup> In para. [55].

<sup>72</sup> In para [56].



‘In our adversarial system of civil litigation one side or the other has to bear the onus of proof. Differentiation between the parties in that regard is thus inevitable. So is the disadvantage under which the side carrying the load often labours. Its location for specific issues depends not on doctrinaire considerations, but on wholly pragmatic ones.’

The equality challenge in that case was based on the simple proposition that a defendant facing a claim for negligence based upon a forest fire bore the burden of disproving negligence whereas in conventional delictual cases the onus would rest on the plaintiff to prove the presence of negligence. The contention that this raised equality issues was rejected on the basis that there were reasonable grounds for imposing the burden in that way in cases of that type. That sufficed to dispose of the issue in that case. However Didcott J did leave open certain broader questions that might impact upon the burden of proof. These he expressed as follows:-

‘The right to equality and the prohibition against unfair discrimination may well have an impact on the civil onus of proof in the highly imaginary situation where a class of litigants is generally saddled with or freed from the burden on account of their personal identities, and with no regard to the exigencies of any particular litigation or to the equipment for such of those persons or institutions. A civil onus may also be vulnerable to attack outside the perimeters of that right and prohibition, and on grounds laid elsewhere by the Bill of Rights, once its incidence impedes the enforcement or defence of any other right entrenched there.’<sup>73</sup>

This judgment was concerned with the incidence of the onus rather than with the extent of the burden imposed upon a particular litigant. These are discrete issues although they may raise similar problems in the context of affording litigants a fair trial. The extent of the onus and the degree of proof that has to be tendered in a case may have as great an impact upon a litigant as does the imposition of the burden of proof in the first place.

To impose upon a person seeking to arrest an associated ship the evidential burden of establishing that the vessel that it wishes to arrest is an associated ship in relation to the ship concerned is not particularly controversial. It is consistent with the first general rule in allocating

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<sup>73</sup> Para. [57].

the burden of proof namely that the person who alleges must prove the allegation.<sup>74</sup> It is pertinent to note that in principle both judgments in the Constitutional Court took the view that the allocation of the burden of proof to one of other party in litigation will not in general be susceptible to constitutional challenge provided the allocation is based on reasonable grounds. The decision to impose the burden of proving association on the applicant for an arrest can hardly be characterised as unreasonable particularly as it is consistent with the treatment of all other litigants. A challenge to the incidence of the burden of proof is not therefore open to an applicant.

The debatable issue from the perspective of the Constitution is rather the extent of the burden in the context of proceedings dealt with on application, where disputes of fact are almost invariably to be resolved in favour of the respondent.<sup>75</sup> The decision by the Constitutional Court does not bear directly upon that problem. However similar principles are likely to apply in regard to the extent of that burden, that is, in the case under consideration, whether it should be necessary to establish the association on a balance of probabilities or only on a *prima facie* basis. Unless it can be said that the allocation or extent of the burden of proof is unreasonable it is unlikely to be susceptible to a constitutional challenge.

That is a substantial hurdle to surmount, as the constitutional test for reasonableness is whether the decision in question is one that a reasonable decision-maker could reach.<sup>76</sup> It would be difficult on the grounds of reasonableness alone to condemn the decision of the Appellate Division<sup>77</sup>, applying certain existing principles that an applicant for an associated ship arrest needed to prove the association on a balance of probabilities. Although that view can be questioned, as it has been in Chapter 5, it can hardly be condemned as unreasonable. On its own therefore an equality challenge to the jurisprudence in regard to the onus of proof of association

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<sup>74</sup> *Pillay v Krishna and Another*, *supra* p951. The principle is one that can be traced back to the Digest (D 22.3.21).

<sup>75</sup> *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) 634E-635C.

<sup>76</sup> *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), para. [44], p513A-B.

<sup>77</sup> *Bocimar NV v Kotor Overseas Shipping Limited* 1994 (2) SA 563 (A).

would not succeed. Nor could it be challenged in principle as unreasonable in relation to a fair trial challenge. However a more nuanced challenge based on fair trial rights may have greater prospects of success. That requires an exploration of the extent to which the Constitution guarantees a civil litigant a fair trial.

Under the Interim Constitution whilst there was a right of access to courts it was limited to a right ‘to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum’.<sup>78</sup> The effect of this was considered by the Constitutional Court in *Bernstein and Others v Bester and Others NNO*<sup>79</sup> where the appellants, who were being subjected to an enquiry under sections 417 and 418 of the Companies Act<sup>80</sup>, claimed that such an enquiry infringed their right to fairness in civil litigation. The Court<sup>81</sup> said this raised a ‘crucial issue’ of whether the Interim Constitution had constitutionalised civil procedure, wholly or in part. The appellants’ contention was that the right of access to a court of law implied more than simply the right to engage formally in a judicial process. The claim was that in order for that right to have substance and be meaningful it must imply the right of access to a fair judicial process. Accordingly, so the argument ran, this right guaranteed everything necessary to ensure a fair civil trial. On that basis it was contended that a fair civil trial was a protected right.

Ackermann J rejected this contention. He said<sup>82</sup>:-

‘No one would dispute that civil procedure ought to aim at fairness between contending parties. That is, however, not the issue. The question is whether the Constitution enacts such a norm as an entrenched right. Over the years our Courts  
“have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands”

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<sup>78</sup> S22 of the Interim Constitution.

<sup>79</sup> 1996 (2) SA 751 (CC).

<sup>80</sup> Act 61 of 1973, as amended.

<sup>81</sup> Per Ackermann J.

<sup>82</sup> Para. [105].

It must be necessary in order 'to realise the ostensible legislative intention or to make the Act workable'. It is also necessary to bear in mind that we are not construing a Constitution which was framed centuries ago, but one which came into force on 27 April 1994. The Constitution as a whole, and s22 in particular, appears to be workable and to realise the ostensible legislative intention, without the implication the applicants seek to rely upon. When s22 is read with s96(2), which provides that '(t)he Judiciary shall be independent, impartial and subject only to this Constitution and the law' the purpose of s22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other *fora* which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee' for it prevents legislatures, at whatever level from turning themselves by act of legerdemain into 'courts'.'

Justice Ackermann then drew attention to the fact that detailed fair trial procedures were contained in the Interim Constitution in regard to criminal proceedings but not in regard to civil proceedings. He accordingly held that the Interim Constitution did not create any constitutional right to fairness in civil litigation.

The Constitution now goes further than did section 22 of the Interim Constitution in that section 34, which deals with the right of access to courts, explicitly states that everyone has the right to have any dispute decided in 'a fair public hearing'. Does this achieve what Ackermann J said was not embodied in the Interim Constitution? To some extent the answer must be in the affirmative but to precisely what extent is not entirely clear. There is a cautious reference to the possibility that section 4 embodies a right to a fair trial and to fair justice in *Lane and Fey NNO v Dabelstein and Others*.<sup>83</sup> However, the challenge sought to be raised in that case was based on a contention that the SCA had failed to consider crucially important evidence in arriving at its decision. The Constitutional Court said that even if the SCA had erred in its assessment of the facts that would not constitute the denial of the constitutional right to a fair hearing. Its pithy view was that:-

'The Constitution does not and could hardly ensure that litigants are protected against

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<sup>83</sup> 2001 (2) SA 1187 (CC), para. [4].

wrong decisions.’

That stance is one that the court has repeated.<sup>84</sup>

Rather more assistance is obtained from a case concerning the requirements of notice to be given to ratepayers before a local authority could pursue procedures to recover rates. The complaint was that the relevant notices had not come to the attention of the ratepayer and hence that a sale of the property pursuant to the statutory recovery procedures was invalid and fell to be set aside. The contention was that certain provisions of the Provincial Ordinance, in which the procedures to be followed in the recovery of outstanding rates were set out, infringed the right to a fair hearing in terms of section 34 of the Bill of Rights.<sup>85</sup>

Yacoob J delivered the judgment of the court and undertook some analysis of the fair hearing component of section 34. He said the following:-

‘[11] This s34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. *Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair.* It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. ‘ (Emphasis added.)

This and other remarks in the judgment related specifically to the question of giving notice to the person against whom an order was being sought. However, that does not mean that they are inapplicable to other situations and other circumstances. As Yacoob J said<sup>86</sup> ‘the hearing itself must also be fair’. He did, however, stress that fairness is a matter of the process whereby the

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<sup>84</sup> *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC), para. [14].

<sup>85</sup> *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civil Association Intervening)* 2002 (1) SA 429 (CC).

court arrives at its decision not a question of the fairness of the substantive law applicable to the dispute or the relief that may be granted by the court.

It seems from this decision that the incorporation in section 34 of the Bill of Rights of a right to a fair hearing does impact upon the continuing validity of what was said by the Constitutional Court in *Prinsloo v Van der Linde* and *Bernstein and Another v Bester and Others NNO*. Both those decisions were handed down under the Interim Constitution that did not guarantee a fair hearing in regard to the determination of justiciable disputes. They cannot therefore be taken to be determinative of what will constitute a fair hearing under the constitutional guarantee to such a hearing now embodied in section 34 of the Bill of Rights. That does not mean that the statements in *Prinsloo v Van der Linde* concerning the allocation of the onus are necessarily to be disregarded. There does not seem to be anything unfair in allocating the onus of proving the association on which an applicant for an arrest relies upon that applicant. The difficulty is occasioned by the fact that this onus has to be discharged on a balance of probabilities on affidavit in circumstances where the courts have exhibited considerable reluctance to require discovery by the respondent or to refer disputed matters for the hearing of oral evidence or to trial. If there is a constitutional difficulty it lies in the combination of those two factors and not with either of them in isolation. Thus there is no difficulty in the applicant for an arrest bearing the burden of proving association on a balance of probabilities if in disputed cases the matter is not simply resolved by an application of the *Plascon-Evans* rule but could be referred for the hearing of oral evidence or to trial on the same basis as would be done in other applications<sup>87</sup>. Equally there would be no difficulty in the court being reluctant to refer such matters to evidence or trial if the onus of proof only required to be discharged on a *prima facie* basis, as with the merits of the claim. Any constitutional difficulty it is occasioned by a combination of the two matters not by either of them seen in isolation.

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<sup>86</sup> Para. [14].

<sup>87</sup> In accordance with the principles in *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 979B-980A and 981D-982D.

Civil cases in South African law are decided on a balance of probabilities. That is a universal rule to which there are limited exceptions. Thus in an attachment *ad fundandam et confirmandam jurisdictionem* it is sufficient for the applicant to show that they have a claim against the respondent whose property they seek to attach on a *prima facie* basis only<sup>88</sup>. Similarly an applicant for relief by way of an interim interdict merely has to demonstrate the existence of a *prima facie* case, albeit open to some doubt.<sup>89</sup> However, these are limited departures and the only basis upon which it can be contended that there should be a similar relaxation of the ordinary rule in the case of an associated ship arrest would be that the existence of the association is as much a part of the existence of the cause of action as it is a matter of identifying property that is susceptible to arrest. The same is true when one is dealing with a security arrest because that is a special right of action and right to claim relief existing only under the Act and not generally available in other jurisdictions. However it is correct that the arrest itself will be merely preliminary to proceedings in another forum and probably in another jurisdiction. Unlike the case of an action *in rem* where the issue would be dealt with and determined in accordance with the ordinary rule in regard to the extent of the onus in civil proceedings there will be no further hearing or consideration of the issue and the grant of the security arrest will afford final relief. It does not seem right or appropriate to grant final relief on the basis of such a low level of proof. It also seems inappropriate to allow the question of the onus in proceedings to set aside an arrest to vary depending on whether the arrest is pursuant to an action *in rem* in South Africa or a security arrest where the main claim will be adjudicated elsewhere. Accordingly whilst there are reservations about the reasons by which the courts have reached the conclusion that the onus falls to be discharged on a balance of probabilities it cannot be said that this is a view that could not reasonably be held. For those reasons it does not seem that a constitutional challenge to the extent of the burden of proof in these matters will succeed. From a constitutional perspective therefore it is perhaps better to concentrate on the consequence

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<sup>88</sup> The same rule applies to proof of the existence of a claim in an arrest in admiralty but the courts have overlooked that the claim in an action against an associated ship includes the fact of association and therefore applied a different burden of proof to this issue in one context to that which is applied in another. Association has to be proved *prima facie* in order to show that the applicant has a claim and on a balance of probabilities to justify the arrest of the ship. This is an Alice in Wonderland situation.

of applying that rule in regard to the extent of the onus of proof in cases that fall to be determined on affidavit.

South African civil procedure essentially recognises two forms of proceeding. The one is by way of action where the disputes between the parties are defined by pleadings and disputes of fact are resolved in a trial where oral evidence is heard and where the rules of civil procedure permit discovery to be obtained and the production of evidence to be compelled. The second form of procedure is on application where the issues are defined and the evidence placed before the court in the affidavits deposed to by the parties. This form of procedure is suitable in cases where legal issues are clearly defined and no disputed factual issues need to be resolved in order for the court to determine the case. Where it is necessary for the proper determination of the case to resolve factual issues that are in dispute on the affidavits the ordinary course is for the court to refer such disputes for the hearing of oral evidence or to trial. There are instances where the court will simply dismiss the application on the basis that the disputes of fact were so extensive and so foreseeable at the time the proceedings were commenced that it was inappropriate to make use of application proceedings. In principle the court will also refuse to send applications to evidence if there are not satisfied that there is a prospect that the hearing of oral evidence may disturb the balance of probabilities as it emerges on the papers. However, it is becoming rare in practice for the courts to adopt that stringent approach and it is always difficult to tell in advance whether oral evidence may make a difference to the outcome. The usual course in application proceedings where disputes of fact need to be resolved is to refer those disputes for the hearing of oral evidence or to refer the entire matter to trial. This is particularly so where the one party has difficulty in obtaining access to the evidence necessary to support its case and where there is a reasonable possibility that the production of documentary evidence as a result of the process of discovery may cast light on the issue in dispute.

The one class of case where this approach is not adopted in practice (although lip service is sometimes paid to the principle) is applications for the arrest *in rem* of associated ships, whether

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<sup>89</sup> *Setlogelo v Setlogelo* 1914 AD 221 at 227.



those arrests are for the purpose of pursuing an action *in rem* in South Africa or for the purpose of obtaining security for a claim that is almost invariably being pursued before another forum in another jurisdiction. In those instances our courts have repeatedly declined either to refer the dispute of fact for the hearing of oral evidence or, in cases where the arrest was for the purpose of commencing an action *in rem* in South African, to refer to dispute to trial as one of the issues in the action. The cases in this regard have already been canvassed and there is no need to repeat them.<sup>90</sup> The question is whether this approach infringes the fair hearing rights of applicants for associated ship arrests, whether alone or in conjunction with their right to the equal protection of the law.

It is appropriate to start by pointing out that whether the arrest of an associated ship is effected in order to commence an action *in rem* against the ship or whether it is an arrest in order to obtain security, the claimant is seeking to take advantage of a substantive right given to them by the Act. If the arrest is the first step in an action *in rem* the claimant is seeking to enforce a right of action and a cause of action that exists only in South Africa. The judgments in *The Berg*<sup>91</sup> clearly hold that an action *in rem* against an associated ship is a separate action from an action *in rem* against the ship in respect of which the claim arises. Not only is the action directed at a different vessel but the ultimate responsibility for the claim will lie with a different person in the form of the owner of the associated ship, as opposed to the owner of the ship concerned. Whilst the owners will either be the same people or will be controlled by the same people that link must not be permitted to obscure the fact that, unless one is dealing with sister ships, different juristic persons are ultimately going to bear the liability for a successful claim. This is of fundamental importance in litigation. If a party sues the wrong juristic entity it will lose its action and no amount of protesting that there were connections between the party sued and the party liable will avail it.<sup>92</sup> There is no reason to treat the case of the associated ship any differently.

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<sup>90</sup> Chapter 5 footnotes 134-138.

<sup>91</sup> *Euromarine International of Mauren v The Ship 'Berg'* 1984 (4) SA 647 (N); *Euromarine International of Mauren v The Ship 'Berg'* 1986 (2) SA 700 (A).

<sup>92</sup> *Associated Paint & Chemical Industries (Pty) Limited t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789

A second factor concerning actions *in rem* against associated ships is relevant as background to the consideration of the constitutional issue. It is that in terms of section 7(1)(a) of the Act a court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted if it is of the opinion that another court or tribunal will exercise jurisdiction in respect of the proceedings and if it is more appropriate that the proceedings be adjudicated upon by such other court or tribunal.<sup>93</sup> This introduces a different situation in admiralty proceedings to that which prevails in conventional proceedings before South African courts where the rule is that if a court has jurisdiction it has no general power to decline to exercise that jurisdiction.<sup>94</sup> The mechanism provided by the Act to prevent inappropriate proceedings being pursued in South Africa is by way of the mechanism of a stay in terms of section 7(1)(a). By permitting a challenge to the arrest on the basis that the arrested ship is not an associated ship in relation to the ship concerned the Defendant is afforded an opportunity to avoid the jurisdiction of the South African court without submitting to a trial on the question of association. That overlooks the fact that, apart from the power to stay proceedings under section 7(1)(a), the jurisdiction of the South African court is established as of right. More importantly the fact that the remedy of a stay is available to prevent proceedings from being pursued in this country that should more appropriately be pursued elsewhere is a complete answer to the oft-expressed judicial reluctance to entertain cases involving foreign litigants and arising out of foreign causes of action. Such reluctance, to which further reference will be made below, is simply inconsistent with the policy in regard to such cases that emerges from the Act itself.

Turning to the case of the security arrest of an associated ship it is again of fundamental importance to note that the right to obtain security is a substantive right given to claimants by and on the terms of section 5(3) of the Act. It is not in any way dependent upon the proceedings in

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(SCA); *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Limited* 2004 (3) SA 160 (SCA); *Four Tower Investments (Pty) Limited v André's Motors* 2005 (3) SA 39 (N) para. [21] - [29].

<sup>93</sup> *Mt Tigr: Bouygues Offshore SA and Another v Owners of the MT Tigr and Another* 1998 (4) SA 740 (C); *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) 939 B-E.

<sup>94</sup> *Longman Distillers Limited v Drop Inn Group of Liquor Supermarkets (Pty) Limited* 1990 (2) SA 906 (A) 914E-G; *Goldberg v Goldberg* 1938 WLD 83 at 85-86; *Standard Credit Corporation Limited v Bester and Others* 1987 (1) SA 812 (W).

which the secured claim will be pursued or the outcome of those proceedings. It is not even logically prior to those proceedings as the application for security may be made at any stage. It is true that the right to obtain security is ancillary to the existence of those proceedings, but it nonetheless remains separate from those proceedings and collateral to them.<sup>95</sup>

The position is therefore that whether one is considering the arrest of an associated ship in the context of an action *in rem* to be pursued in South Africa against the associated ship or its arrest for the purpose of obtaining security under section 5(3) of the Act one is concerned with the exercise of substantive rights conferred upon litigants by the legislature. This has two consequences. Firstly, it is not appropriate to treat the rights as being purely of a procedural nature because that is an incorrect characterisation. Although they clearly have a procedural aspect they are rights of substance. Secondly, it is inappropriate for the courts to exhibit a reluctance to afford to litigants the rights that the statute has given them. There are cases, as has been pointed out, where our courts have expressed views that suggest a reluctance to give effect to these rights because the beneficiaries are usually foreign litigants.<sup>96</sup> The judicial reluctance to entertain litigation involving foreign litigants and foreign causes of action that is manifest in statements such as these is, with respect, to be deprecated. The policy embodied in the Act is clearly one that vests our courts with jurisdiction to entertain claims by foreign litigants (*peregrini*) against other foreign litigants on foreign causes of action. For the courts to exhibit reluctance to give effect to this policy is inconsistent with the policy of the Act and amounts to a judicial rewriting (or even repudiation) of that policy. That was always impermissible but is even more so in a constitutional democracy based upon a separation of powers. Whilst we are dealing with pre-constitutional legislation there has been no indication in the time that has passed since 1994 of any inclination on the part of the legislature to limit or restrict the jurisdiction conferred upon our courts by the associated ship arrest provisions of the Act. It is well to heed the warning

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<sup>95</sup> *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) 1042B-F.

<sup>96</sup> *Katagum Wholesale Commodities Co. Ltd v m.v. Paz* 1984 (3) SA 261 (N) 263H and 270D; *m.v. Snow Delta : Serva Ship Limited v Discount Tonnage Limited* 2000 (4) SA 746 (SCA), para. [14] p755E-F; the passages from two earlier decisions cited in *Siemens Limited v Offshore Marine Engineering Limited* 1993 (3) SA 913 (A) at 922A-B and 926A-C and *Bocimar NV v Kotor Overseas Shipping Limited, supra*, 586E-F citing with approval the view of

of Langa CJ that:-

‘We must be careful as a court not to substitute our preferred policy choices for those of the legislature. The legislature is the democratically elected body entrusted with legislative powers and this court must respect the legislation it enacts, as long as the legislation does not offend the Constitution.’<sup>97</sup>

There is a further practical reason why the courts should respect the policy choices embodied in the Act that give foreign litigants the power to approach South African courts to bring about the arrest of associated ships either for the purpose of pursuing their claims in this country or for the more limited purpose of securing security for those claims whilst they are being pursued elsewhere. It is that it is by no means clear that the exercise of such an expansive jurisdiction is detrimental to the interests of South Africa although that is advanced as a reason for caution in respect of such matters. The jurisdiction has been in existence for over twenty-five years. During the course of time South African trade has ebbed and flowed but there is nothing to indicate that the existence of the associated ship jurisdiction has been detrimental to trade or has resulted in foreign shipowners being reluctant to allow their vessels to call at South African ports or traverse South African waters. The implementation of the policy has enabled South Africa to become a recognised centre of maritime litigation and has undoubtedly brought business to our shores. The same considerations are true of other centres for maritime litigation amongst which London has become pre-eminent as a centre for the resolution of international commercial disputes by way of litigation in the English courts or arbitration. There has been no reluctance on the part of the English courts to exercise jurisdiction in relation to matters between foreigners on foreign causes of action nor has there been any indication that this has been detrimental to English trade. On the contrary it is something that is actively promoted. Before judges in South Africa express reluctance to involve South African courts in such international litigation they should perhaps reflect that the legislature may have taken account of matters such as these in adopting and sustaining the policy decision to vest our court with jurisdiction to deal with such claims and to afford foreign litigants the particular benefits attaching to the ability to arrest

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the court below.

<sup>97</sup> *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) para. [174].

vessels as associated ships.

It is submitted that the starting point for a consideration of the constitutional issue must be that the people who seek to arrest associated ships have a right to do so that is not simply a procedural (or interlocutory) matter but one that confers tangible substantive benefits upon them. The legislature has seen fit to confer these benefits and notwithstanding the enormous changes that have occurred in South Africa since this legislation came into operation it has given no indication that it intends to limit or remove such rights. Nor has there been a wave of international condemnation that should give a South African court pause for thought before permitting a foreign litigant to exercise these rights. For these reasons it is submitted that applicants for an associated ship arrest should not be treated as a special class of litigant whose presence in our courts is to be tolerated but if possible avoided. Procedural obstacles should not be placed in the way of such litigants that are not placed in the path of other litigants. The fact that they are foreign or that the defendant is owned by a foreign company or that the claim arose outside South Africa should be regarded as entirely irrelevant to the question whether an application for an arrest, or more probably an application to set aside an arrest already effected, should be referred for the hearing of oral evidence on a disputed issue of association. Not only is this accord with the policy of the Act it is also consistent with the recognition that in maritime matters courts are inevitably seized of issues that are international in regard to both the substance of the dispute and the parties thereto. The Act clearly accepts and indeed welcomes that international dimension. In giving effect to rights conferred by the Act Courts should do so as well.

Although it has been said by the Appellate Division (as it then was) that the ordinary rule in regard to the discretion to allow oral evidence in applications applies also in relation to disputes of fact in an application for the security arrest of an associated ship<sup>98</sup>, the court in that case also

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<sup>98</sup> *Bocimar NV v Kotor Overseas Shipping Limited, supra*, 587F-G. In fairness it should be borne in mind that the issue in regard to which the dispute of fact arose in that case was not the issue of association but the question whether a reasonable need for security had been established. That raised a more complicated issue in regard to the identification of the issues to be referred for the hearing of oral evidence than would be the case in a dispute over

endorsed the view that the arrest proceedings were interlocutory<sup>99</sup> and that this, together with the fact that the proceedings were between foreigners and the dispute between them was unconnected with South Africa, were important factors in the court's refusal to refer the application for oral evidence. It is respectfully submitted that in both respects the court erred. An interlocutory order is one usually of a procedural nature that is ancillary to the main issues arising in a case.<sup>100</sup> The arrest of the associated ship, whether pursuant to an action *in rem* or a security arrest, is not interlocutory in this sense. In the one instance it is the necessary point of commencement of the litigation but central to the fundamental issue of liability. In the other it is the entire substantive claim. The refusal to grant such orders or the setting aside of an arrest after it has first been obtained, is final and definitive of the claim in the one instance<sup>101</sup> or the substantive right to security in the other. As such both claims are recognised as having the quality of finality in disposing of a person's rights that entitles a disappointed claimant to appeal.<sup>102</sup>

As regards the question of the litigation being between foreigners it has already been submitted that at a policy level this should be irrelevant. From the perspective of constitutional rights the effect is to treat applicants for the arrest of associated ships as falling in a different category from other applicants for relief from our courts. That is precisely the situation that Didcott J regarded as improbable in the reservations that he expressed in *Van der Linde v Prinsloo* namely the situation where 'a class of litigants is generally saddled with or freed from the burden on account of their personal identities, and with no regard to the exigencies of any particular litigation or to the equipment for such of those persons or institutions.' There can be no

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association where the issue can be identified fairly simply.

<sup>99</sup> For tactical reasons relating to the submissions in regard to the extent of the onus, that is, its contention that this should be *prima facie* proof only and not on a balance of probabilities this was accepted by the appellant's counsel, erroneously in my view.

<sup>100</sup> *South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited* 1977 (3) SA 534 (A) 549G-H.

<sup>101</sup> The claimant will still be able to pursue a claim for the amount in question against the original debtor but the refusal or setting aside of the arrest of the associated ship will be definitive of the claim against the associated ship itself.

<sup>102</sup> This is subject to the question of mootness that may arise if security has not been given and the vessel leaves the

doubt that overwhelmingly the applicants for the arrest of vessels as associated ships are foreigners, usually companies incorporated in some other jurisdiction. In adopting a special procedural approach to their claims that is posited on the fact that they are foreigners it is reasonably arguable that they are being denied the right to equal protection and benefit of the law conferred upon everyone, both citizens and foreigners, by section 9(1) of the Bill of Rights. This is consistent with the view taken by our courts that discrimination on the basis of citizenship is an analogous ground to those listed in section 9(3) of the Constitution and amounts to discrimination.<sup>103</sup> There is of course a difference between the case of natural persons who are citizens and those who are not, and the case of juristic persons incorporated in South Africa and those that are incorporated in other jurisdictions. However, it is unnecessary for present purposes, to contend that the foreign corporation is being discriminated against in terms of section 9(3) of the Constitution. It is sufficient to say that in adopting a more stringent approach to references to oral evidence in the case of foreign litigants seeking to enforce statutory rights to arrest associated ships given to them in South Africa, the courts are treating one class of litigant differently from all other litigants and in so doing they are denying them the equal protection and benefit of the law.

It is submitted that the effect of these considerations is that the constitutional guarantee of a fair hearing, taken in conjunction with the guarantee to everyone of equal protection of the law, militates strongly against the court taking into account against an applicant for an associated ship arrest the fact that they are a foreigner (*peregrinus*), that the other party to the litigation is also a foreigner or that the issues in dispute are issues not having an immediate and direct connection with South Africa other than via the arrest of the associated ship. Taking those factors into account against people who have statutory rights in South Africa that are only enforceable in this country and before the courts of this country, denies them their constitutional right to a fair hearing and the equal protection of the law.

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jurisdiction before an appeal can be heard.

<sup>103</sup>*Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Society Development and Others* 2004 (6) SA 505 (CC) paras. [70] and [71].

As the cases already discussed in Chapter 5 reveal, the refusal of applications to refer questions of association for the hearing of oral evidence has become virtually routine. The approach adopted by the courts is that such an order should only be granted in rare cases. It is submitted that not only is the foundation for that approach unsound for the reasons already canvassed in Chapter 5, but that the constitutional imperatives discussed in this section likewise indicate that such an approach is impermissible. That is not to say that the court may not in appropriate cases, where there is little likelihood of oral evidence or discovery disturbing the balance of probabilities, refuse such an order. That is the usual rule applicable to all litigants. Nor does it suggest that the court should not take account of questions of convenience and inconvenience, particularly if an arrested vessel were to remain under arrest for a protracted period whilst the issue of association was under consideration. However, ordinarily the proper way to deal with this, if in other respects a reference to evidence is appropriate, is to make appropriate arrangements to dispose of the case in a way that will limit or mitigate any such prejudice, not to refuse a reference to evidence. It is submitted that there is no foundation in fact or policy for the courts to treat requests for the hearing of oral evidence by foreign claimants seeking the arrest of an associated ship any differently from the way in which they would treat any other application for a reference to oral evidence in a case where there is a dispute of fact on the papers. To do so is, it is submitted, to infringe the constitutional rights enjoyed by all litigants, including foreigners.

## 5 **CONCLUSION**

In general the institution of the associated ship raises relatively few constitutional issues. However the discussion above reveals that there are some constitutional issues that need to be borne in mind in any application for the arrest of a vessel as an associated ship. It can be anticipated that these issues will come to the fore in future as the realisation dawns that the Constitution is as relevant to this aspect of our law as it has already proved to be in the more traditional fields of contract and delict.



## CHAPTER 10

### SECURITY ARRESTS

#### 1 INTRODUCTION

It has not usually been necessary to distinguish in the discussion thus far between the situation where the associated ship arrest has been effected for the purpose of commencing an action *in rem* and where it is arrested in terms of section 5(3) of the Act for the purpose of providing security. Thus references to the arrest of an associated ship have generally encompassed both situations. However, it is necessary to note is that it is strictly incorrect to speak of an associated ship arrest as a single general concept. The reason is that associated ships as defined can be arrested for two clearly distinct purposes. In practice they are most frequently subject to arrest or the threat of arrest for the purpose of obtaining security for a claim in respect of another vehicle that is being or is to be pursued in a court in another jurisdiction or before an arbitration tribunal, almost invariably foreign. This is the right afforded a claimant in terms of section 5(3) of the Act. The other instance of an associated ship arrest is where the claimant intends to pursue proceedings in South Africa to recover its claim by way of an action *in rem* against the associated ship. The two proceedings are fundamentally distinct<sup>1</sup> and have different consequences. They must therefore be considered separately.

#### 2. ASSOCIATED SHIPS AND SECURITY ARRESTS:

A security arrest in terms of section 5(3) of the Act is an independent right conferred on

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<sup>1</sup> Unlike the provisions of sections 19 and 29 of the Australian Admiralty Act 1988 where security can be obtained by the expedient of commencing an action *in rem* against the ship concerned or a surrogate ship - a concept essentially similar to the sister ship of the Arrest Convention - and then seeking a stay of the proceedings on condition that the ship or other property is retained as security for the award in the arbitration or judgment in the litigation, as the case may be. *Comandate Marine Corp v Pan Australia Shipping (Pty) Ltd* [2006] FCAFC 192, para. 59. The approach that has been given statutory recognition in Australia appears to be similar to that developed in England as described by Brandon J in *The Eleftheria* [1969] 2 All ER 641 (PDA) at 645 but not available in respect of arbitrations until the passing of s 26 of the Civil Jurisdiction and Judgments Act 1982.

claimants by the Act in the following terms:-

‘A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.’

The section provides that security may be obtained for arbitration proceedings either in South Africa or elsewhere. It also contemplates that security may be obtained for court proceedings either in South Africa or elsewhere but that is in general terms an anomaly. Any such proceedings would be proceedings in respect of a maritime claim and such claims are only cognisable by the court exercising its admiralty jurisdiction.<sup>2</sup> That is subject to a qualification – itself something of an anomaly - because when a question arises whether a claim is a maritime claim a court is obliged to decide that issue summarily and its decision is then final and binding. If it erroneously holds that a claim is not a maritime claim then provided it has jurisdiction on conventional grounds it is required to hear and determine the dispute.<sup>3</sup> Apart from this unusual situation, however, a maritime claim is litigated before a court exercising admiralty jurisdiction and those proceedings will be pursued, either *in personam* after an attachment to found and confirm jurisdiction or *in rem* after an arrest or deemed arrest. In those circumstances the scope for a security arrest in relation to proceedings in South Africa is extremely narrow and I have never encountered one.

The requirements to obtain such an arrest are a *prima facie* claim, that is a maritime claim in terms of the Act that is enforceable by an action *in personam* against the owner of the property concerned or by an action *in rem* against such property being other the ship concerned or an

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<sup>2</sup> Section 7(2)(a) of the Act.

<sup>3</sup> *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd and another* 1996 (4) SA 1167 (A) at 1176F-1177A.

associated ship and a genuine and reasonable need for security in respect of the claim.<sup>4</sup> The requirements for establishing that a vessel is an associated ship are the same as those applicable where the arrest is sought for the purpose of commencing an action *in rem*. But there the resemblance ends. The reason is that the security arrest serves an end in itself as opposed to being the starting point of a continuing proceeding before the South African courts. Once the arrest has been obtained and maintained against any challenge the proceedings under section 5(3) are complete. The claimant has obtained the security it sought and can then proceed with the contemplated litigation or arbitration with the advantage of being secured in respect of the outcome of those proceedings.

The section contemplates that the ship arrested will itself serve as security for the claim. In practice that is not ordinarily the case as it is usual for the owner of the arrested ship to provide security for the claim in the form of a P&I Club letter of undertaking or a bank guarantee. This enables the ship to sail and indeed probably releases it from any question of liability in that the security will ordinarily be furnished at the instance of the owner of the ship concerned and relate specifically to the liability of that owner and that vessel rather than to any liability attaching under the Act to the associated ship or its owner.

Once security has been furnished and the vessel sails that is normally in practice an end to the matter although it has been held that the South African court retains jurisdiction, at least in matters relating to the security on the basis that there is a continuing deemed arrest of the arrested vessel in terms of section 3(10)(a)(i) of the Act.<sup>5</sup> The exercise of that jurisdiction may however not be readily capable of enforcement as the facts of that case demonstrate. The vessel had been arrested as an associated ship as security for claims arising out of the purchase of two

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<sup>4</sup> *Cargo laden and lately laden on board the m.v. Thalassini Avgi v m.v. Dimitris* 1989 (3) SA 820 (A). As to the requirement of a genuine and reasonable need for security see *Bocimar NV v Kotor Overseas Shipping Limited* 1994 (2) SA 563 (A); *United Enterprises Corp v STX Pan Ocean Co. Ltd* [2008] 3 All SA 111 (SCA) and *m.v. Orient Stride: Asiatic Shipping Services Inc. v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA).

<sup>5</sup> *M.V. Alam Tenggiri: Golden Seabird Maritime Inc and Another v Alam Tenggiri SDN BHD and Another* 2001 (4) SA 1329 (SCA).

other vessels. It had been released against the provision of P&I Club letters of undertaking but in the contemplation that these would be replaced by other guarantees. This in fact happened after the vessel had sailed and the original guarantees were replaced by guarantees issued by a bank in Nova Scotia but provided that they would be subject to the exclusive jurisdiction of the High Court in London. There was accordingly nothing left in South Africa against which the South African court could exercise jurisdiction and the guarantees that now stood as security for the claims in respect of the other two vessels were explicitly subject only to the jurisdiction of a foreign court. Nonetheless the South African court held that it continued to have jurisdiction by virtue of a continuing deemed arrest of the *m.v. Alam Tenggiri* and this entitled it to deal with the validity of the original arrest.<sup>6</sup> All one can say in regard to this situation is that the jurisdiction retained by the South African courts as a result of the deemed arrest is somewhat vestigial. The position will of course be different if the guarantees are enforceable in South Africa,<sup>7</sup> but for practical reasons that will sometimes not be the case as the arresting party may prefer to obtain and the other party will prefer to furnish a guarantee enforceable in the jurisdiction where any ultimate judgment or arbitration award will be enforced. In some instances therefore once security is put up for the release of an associated ship the matter will lose its connection with this country entirely.

Where no security is put up for the release of the arrested vessel it will either be held under arrest pending the outcome of the proceedings in respect of which it was arrested or, more probably in the light of the costs consequent upon such an exercise, sold and the proceeds constituted as a fund in court in terms of section 9 of the Act. This is likely to render its value as security problematic because the ordinary reason for security not being furnished is financial

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<sup>6</sup>I am not aware of what happened thereafter and whether the Nova Scotian guarantees were surrendered in consequence of the setting aside of the South African arrest. Quite what the South African court could have done had the claimant refused to release the guarantees is unclear. Presumably relief could only have been obtained by approaching a court in England and asking it to recognise the order setting aside the arrest.

<sup>7</sup>Anecdotal evidence gathered from attorneys having significant maritime practices is that in most instances security is given by way of P & I Club letters of undertaking or guarantees issued by South African banks that in turn have obtained back to back guarantees from a foreign bank.

inability to provide or obtain such security.<sup>8</sup> If that is indeed so and the owner of the arrested vessel is unable to provide or obtain security to secure its release the probability is that the owner will be in precarious financial circumstances and that other creditors will come to the fore seeking to protect their own interests. Thus the sale of the vessel and the creation of a fund in court ordinarily prompts creditors having direct claims against the arrested vessel to arrest either the vessel itself or the fund<sup>9</sup> and thereafter seek an order for the distribution of the fund in terms of section 10 of the Act by the usual means of obtaining the appointment of a referee to advertise for and receive claims and to report to the court on the proper distribution of the fund. In any such distribution claims against the fund on the basis that the arrested vessel was an associated ship will rank last.<sup>10</sup> It is improbable in a situation where the owner of the arrested vessel is unable to provide security for the claim in respect of which it has been arrested but the sale of the vessel under section 9 will generate a fund sufficiently large to satisfy all direct claimants as well as the claim of the arresting creditor.

All of these consequences of the arrest of a vessel for security under section 5(3) are applicable whether the vessel is the ship in respect of which the claim arose or an associated ship. In other words in the case of a security arrest there is no ground for differentiating between the ship concerned and an associated ship insofar as the consequences of the arrest are concerned. The effect is the same and the consequences that follow, other than practical ones where the ship is sold, will also be the same.

It will I think be apparent from the fact that the security arrest is a special institution under the South African Act that it is inappropriate to speak of a security arrest, whether of the ship concerned or of an associated ship, as a proceeding *in rem* or as a proceeding *in personam*, at

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<sup>8</sup> I know of one case where the mv 'Lady East' was arrested as security and thereafter sold where the arresting creditor had its expenses paid and received full security from the price, which was very high in the light of market conditions at the time. However this appears to have been an isolated instance and where the security arrest is of an associated ship it is likely that it will prove to be a *brutum fulmen*.

<sup>9</sup>In terms of s 3(5)(8) of the Act.

<sup>10</sup>s11(11)(b).

least insofar as those expressions convey meaning in regard to different forms of action in admiralty proceedings in South Africa.<sup>11</sup> It is correctly described as a ‘stand alone’ procedure unconnected, unlike similar provisions elsewhere, from any action before the South African court.<sup>12</sup> The security arrest under section 5(3) is a procedure whereby property can be arrested and detained and ultimately, if no alternative security is provided, sold to satisfy a claim. In that sense it is more closely akin to the process of execution than it is to any form of action. It serves either to provide the means by which a judgment or arbitration award may ultimately be enforced where alternative security is provided to enable the arrested vessel to be released or where the vessel is sold and a fund created (although for the reasons mentioned above this may not in the end result to secure payment) or it will itself be available for the purpose of execution. It is *in rem* only in the sense that it is directed at a particular asset but that is hardly a reason to describe it in a way that can only lead to confusion. It is also wrong to say that it does not serve to bring a person before the court. Quite clearly as it is directed at particular property it serves to bring the owner of the arrested ship before the court to defend its property. The fact that the owner is not named cannot disguise the true position. The effect of the arrest is to compel the owner to ensure that security for a claim is provided either by itself or by or on behalf of the party personally liable in respect of that claim at the risk of losing its vessel if it fails to do so.

The effectiveness of security arrests as a means of inducing the provision of security through more conventional means is best illustrated by the fact that there are no reported cases dealing with the distribution of funds in court where the fund has arisen from the sale of a ship arrested as security under section 5(3) of the Act. That means that our courts have not had to

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<sup>11</sup> In *The m.v. Zlatini Piasatzi : Frozen Food International Limited v Kudu Holdings (Pty) Limited and others* 1997 (2) SA 569 (C) 574G-H, Conradie J said that: ‘An arrest under s5(3) is a proceeding *in rem*. I believe that this emerges clearly from the history of the provision discussed in *Katagum Wholesale Commodities Company Limited v The mv ‘Paz’* 1984 (3) SA 261 (N).’ With respect however it is unclear on what basis he thought that the latter case supported this conclusion. The only procedure *in rem* recognised by the Act is an action *in rem* and a security arrest is not such an action. When he went on to say that a security arrest ‘retains ... the characteristics of an arrest in pursuance of an action *in rem*’ (at 575C-D) the judgment becomes even more inscrutable. Other than the fact that a ship is arrested a security arrest has none of the characteristics of the arrest to commence an action *in rem* as will become clear when those characteristics are discussed below.

<sup>12</sup> The expression is that of Professor Hare and was cited with approval in *MV Rizcun Trader (4) MV Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 785G.

grapple with the question of the process by which a ship arrested as security for a claim becomes the means whereby a judgment or arbitration award can be satisfied. Two routes suggest themselves. The first would be to cause the vessel to be sold in terms of section 9 thereby creating a fund in court lodging the judgment or arbitration award as a claim against the fund.<sup>13</sup> This of course raises the spectre of other claimants emerging to the detriment of the party that obtained the arrest. The second would be to arrest the vessel again in an action *in rem* on the judgment or award<sup>14</sup> and having obtained a judgment on that claim to proceed to execution in the conventional way.

Whilst the associated ship is frequently the target of a security arrest in terms of section 5(3) of the Act its consequences are no different from those that follow from the arrest of the ship concerned for the same purpose. As the security arrest is a separate and special procedure, neither an action *in rem* nor an action *in personam*, the problems attendant upon an associated ship arrest to commence an action *in rem* do not arise. In practice most of the problems that such arrests generate arise in the context of the entitlement to arrest rather than the consequences of the arrest itself. For that reason it is fair to say that the security arrest has been a successful legal innovation, whether directed at an associated ship or otherwise. It presents few difficulties in practice beyond the conventional problems relating to the issue of whether a particular vessel is an associated ship in relation to the vessel in respect of which the claim arose. Once the right to arrest has been established the claimant will ordinarily obtain security in a simpler and more conventional form that enables the disputing parties to address their dispute in their chosen forum in the knowledge that a successful claim will be paid. It is to that end that section 5(3) was enacted and it is an end it generally serves.

In summary where the associated ship is arrested for the purpose of providing security for a claim the nature of the proceedings is defined by that purpose and the consequence is that the vessel stands as security and may potentially be the means of satisfying the claim if no alternative

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<sup>13</sup> This was apparently the approach adopted in the 'Lady East' mentioned in footnote 6.

<sup>14</sup> Both of which are themselves maritime claims in terms of s1 (1) of the Act *sv* 'maritime claim', para. (aa).

security is provided either by its owner or by or on behalf of the person that is personally liable in respect of the claim giving rise to the arrest. The security is established by the fact of arrest and the association must exist at the time when the order of arrest is granted. No issue relating to maritime liens is pertinent. If the claim in respect of which the arrest is effected is one underpinned by a maritime lien that lien over the ship concerned remains intact. If the arrested vessel is subject to a maritime lien that lien remains unaffected by the arrest unless the vessel is sold in which event it is discharged by the sale<sup>15</sup> and falls to be pursued as a preferent claim against the fund arising from the sale. The juristic problems occasioned by associated ship arrests arise elsewhere in the context of the action *in rem* against an associated ship that forms the topic for consideration in the next chapter.

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<sup>15</sup> S9(3) of the Act.



## CHAPTER 11

### **THEORIES OF THE ACTION *IN REM***

Having dealt separately with the arrest of an associated ship for the purpose of obtaining security one can turn to the action *in rem* against the associated ship. Before that can be addressed, however, one must first look more generally at the nature of an action *in rem* in South African law and then see how that is affected by the concept of an action *in rem* against an associated ship. The stated intention of the South African Law Commission was to preserve for South Africa the action *in rem*<sup>1</sup> that it had derived from England in consequence of the application in this country of the Colonial Courts of Admiralty Act 1890. Because this was the intention it is suggested that the starting point for any analysis of the nature of the action *in rem* in this country should be the action *in rem* as it has been developed in English law. Its evolution was traced in Chapter 3 and what falls for consideration at this stage is the manner in which it has been characterised by English courts.

However before that is essayed there is a prior question of principle that must be addressed, namely whether there is scope for the view that there is a South African concept of the action *in rem* or whether the statute merely imports from England the concept of the action *in rem*, as it is known and implemented in that jurisdiction, so that our understanding is not domestic nor formed by the currents of South African law but is dependent upon England and the decisions of its courts, with perhaps some occasional input from other jurisdictions standing in the same historic tradition of admiralty jurisdiction. In other words do we examine the English law because it tells us what the nature of an action *in rem* in South Africa is, or do we look there only for historic background and guidance where appropriate on the interpretation of our Act and the nature of the institution in this jurisdiction?

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<sup>1</sup>Para. 6.4 of the SA Law Commission report on the review of the law of admiralty recommends that the existing admiralty law should be the basis of reform and that this would have the advantage of retaining the benefits of the action *in rem* and the maritime lien.

## 1 IS THERE A SOUTH AFRICAN ACTION IN REM?

The question arises from those provisions of the Act that deal with the law to be applied by the South African court in regard to matters that come before it in the exercise of its admiralty jurisdiction.

Section 6(1) of the Act provides that:

‘(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall—  
with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;  
(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.’

In relation to the maritime lien, another institution of our admiralty law that has its origin in England, it has been said that the effect of this section is to compel a South African court to follow the English rules governing that particular institution.<sup>2</sup> In the *Andrico Unity* the court held that the matter in issue was whether certain arrests under the Act were properly made or should be set aside, on the ground that the arresting party did not have a maritime lien over the arrested vessel. One would have thought that the question whether arrests made under a 1983 statute were properly made was a question arising under that statute but the court held that it was ‘pre-eminently a matter over which a pre-1983 South African court would have had jurisdiction’ under the Colonial Courts of Admiralty Act because the jurisdiction of that court included a jurisdiction in regard to actions *in rem* based upon a maritime lien. According to the court:

‘The issue relates to the right of the claimant to pursue a certain remedy, viz an action *in rem*, rather than the jurisdiction of the court to entertain the suit. And even if the result of the Court deciding that no maritime lien exists can be regarded in effect as a denial of

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<sup>2</sup> *Transol Bunker BV v MV Andrico Unity and others Grecian-Mar SRL v MV Andrico Unity and others* 1989 (4) SA 325 (A) 334H-335D.

jurisdiction, a Court always has jurisdiction to determine its own jurisdiction.’<sup>3</sup>

With respect it is difficult to follow this reasoning. Whilst the claimants clearly had a maritime claim to recover the price of bunkers supplied, that claim could only be pursued and the jurisdiction of the South African court invoked, if it were permissible to bring either an action *in rem* or an action *in personam* in this country. As the bunkers had been supplied on the order of a demise charterer the owner of the vessel was not personally liable on the claim and it could only be pursued *in rem* if the claimant had a maritime lien over the vessel. It is accordingly not correct to say that the issue related to the right to pursue a particular remedy and not to the jurisdiction of the court. The two are inseparable. A court does not have jurisdiction merely because in entirely different circumstances it would be possible to pursue the claim before it against another party by different means. It can only have jurisdiction if both the claim and the named defendant are properly before it. In other words it has jurisdiction because a claim is pursued by a person entitled to do so against a defendant properly brought before the court by means of procedures that it recognises.

As to the second part of this passage the fact that a court has jurisdiction to determine its own jurisdiction is neither here nor there. The issue was whether the claimant had a maritime lien over the vessel and therefore was entitled to invoke the jurisdiction of the court by way of an action *in rem*. The Act says that a maritime claim can be brought in that way if the claimant has a maritime lien over the property to be arrested. That raises a question of the proper interpretation of the Act, namely, what is meant by a maritime lien in the section in question. Until that question is answered the court would not know whether it had any matter before it, much less a matter that required it to have resort to the provisions of section 6 in regard to the law to be applied by the court ‘in the exercise of its admiralty jurisdiction’.

Whether an arrest could be granted by a South African court exercising its admiralty jurisdiction under the Act was clearly not a matter that a South African court sitting as a Colonial Court of Admiralty had jurisdiction to decide. Practical reality, if nothing else, meant that it could not have interpreted the jurisdiction conferred upon a South African court by a

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<sup>3</sup> 335B-C.

South African statute passed 93 years after the Colonial Courts of Admiralty Act, 1890, (which defined the jurisdiction of those courts in different terms) and one that repealed that Act so far as it applied in South Africa. The jurisdiction of a South African court sitting in the exercise of its admiralty jurisdiction is defined by the Act and relates to those claims defined as maritime claims.<sup>4</sup> The manner of exercising that jurisdiction is by way of an action *in personam* or an action *in rem* under the Act. If it is impermissible to arrest a vessel in an action *in rem*, because there is no maritime lien recognised by South African law over that vessel, then the court lacks jurisdiction in the case. The point is well made by Professor Jackson who describes the rules governing the bringing of an action to enforce a maritime claim as constituting the jurisdictional aspect of the enforcement of maritime claims.<sup>5</sup> This is not to say that the court was wrong in that case in looking to the English law regarding maritime liens in order to determine the question whether the arresting parties had maritime liens in respect of their claims – indeed it was invited to do so by all parties - but that was for entirely different reasons.

The concern to which this gives rise in the present context is that if the approach is adopted that the action *in rem* was a matter in respect of which a court of admiralty in South Africa had jurisdiction before the commencement of the Act and therefore that the court is obliged to apply the law of England and Wales in terms of section 6(1)(a) of the Act in regard to its nature and consequences there is little point in a separate South African exploration of this theme. We can simply read the leading English texts on admiralty and apply the English cases. However, in my view this approach is fundamentally flawed. The action *in rem* in South Africa is the creation of a piece of South African legislation that falls to be interpreted in the light of the Act itself and having regard to its history and its present context including the Constitution. A court can only ‘exercise admiralty jurisdiction’ in respect of ‘a matter’ under section 6(1) once it is properly seised of that matter by way of the procedures prescribed by the Act, of which the action *in rem* is one. The existence of the action and its proper invocation is accordingly necessarily anterior to the exercise of jurisdiction in respect of a matter after the commencement

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<sup>4</sup> s2, read with s1(1) *sv* ‘maritime claim’.

<sup>5</sup> D C Jackson, *Enforcement of Maritime Claims*, (4<sup>th</sup> Ed, 2005) 1.

of the action. It follows that the determination of the character of the action is likewise not a matter falling within section 6(1)(a). Put differently a determination of the characteristics of the action *in rem* under the Admiralty Jurisdiction Regulation Act 105 of 1983 was not a matter in respect of which a court of admiralty operating in terms of the Colonial Courts of Admiralty Act 1890 had jurisdiction before the commencement of the Act. The reason for that is that the Act and its action *in rem*, including the vitally important action against the associated ship, did not then exist and were accordingly not within that court's jurisdiction.

For reasons already discussed the Act charted new paths in regard to various aspects of admiralty law and jurisdiction, having regard to history and to developments in the maritime sphere since 1890. It introduced new institutions such as the associated ship and new procedures such as the security arrest. It seems inconceivable that it was the intention that in determining so important a matter as the nature of the actions for which the Act provided South African courts would be bound in a straitjacket of a foreign law that did not have the same institutions or procedures. That is reinforced by the fact that the basis for jurisdiction in South African law has always been recognised to be a matter of substantive law, whereas in England and Wales it is a matter of procedure, its exercise being dependent on the ability to serve the party against whom or which the proceedings were to be brought. The action *in personam* under the Act is in part dependent upon the ability to attach property *ad fundandam et confirmandam jurisdictionem* in accordance with our common law. Maritime law has, as I have endeavoured to show in chapters 2 and 3, civilian roots that are the same as those of our Roman Dutch common law. Against that background it is submitted that it is highly improbable that it was intended to confine our understanding of the action *in rem* to that of the English courts that may at any time, as *The Indian Grace (No 2)* shows, alter its own settled principles in response to new circumstances. It is my contention that our courts are free (as the courts of Canada, Australia, New Zealand, Singapore and Hong Kong, that were also previously Colonial Courts of Admiralty, are also free) to evolve our own distinctive concept of the action *in rem* in South African law and practice. The choice is between following slavishly and passively the English courts or having

our own ‘vibrant and evolving admiralty jurisdiction’.<sup>6</sup> My view is that the latter is what the Act contemplates and South Africa needs. It is also the only approach consistent with the principle that the Constitution is the source of all law in South Africa.

On that basis the approach that should be adopted is that the action *in rem* is a statutory concept within an Act that is in many respects novel and innovative. It exists alongside an action *in personam* that is largely based upon the attachment *ad fundandam et confirmandam jurisdictionem* of the Roman Dutch law, the roots of which are essentially the same as those of the action *in rem*. Those common roots should assist in informing our understanding of the action *in rem* in South Africa. The impact upon the institution of the Constitution and the novel idea of an action *in rem* being commenced by the arrest of an associated ship should also play a role in our understanding of the action. The background is however the action as it came to these shores from England and was for many years known here in its English garb. A convenient approach is therefore to consider it in that form and to assess the extent to which the same rules and principles govern the action in this country. Where factors peculiar to this country indicate that the action in its English form should be adapted to better meet our conditions those factors can be identified and their role described. Where there is no good reason to depart from what we inherited that should remain the South African approach. Accordingly it is submitted that the identification of a distinctive South African concept of the action *in rem*, and in particular the action *in rem* against an associated ship, will recognise the provenance of that action as lying in the English admiralty law and practice imported to this country through the Colonial Courts of Admiralty Act, 1890. Our starting point is therefore the characterisation of the action *in rem* in English law.

## 2 THE NATURE OF THE ACTION IN REM IN ENGLAND

The different views taken by courts in England and elsewhere, principally the United States, in regard to the nature of the action *in rem* have conveniently been described as being

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<sup>6</sup> SC Derrington & J M Turner *The Law and Practice of Admiralty Matters* (2007) 6 para. 1.17

underpinned by theories of procedure and personification. More pertinently the issue is whether the action *in rem* is merely a procedure for commencing action in a particular and peculiar form against the owner of a ship, or whether it has a substantive content that results in a subtle alteration of its nature and requires separate and special treatment so that it can be said that the action lies against the vessel alone? It is easy to say that a ship is not a person and accordingly is incapable of being a litigant and that the action *in rem* is a recognised form of procedure in the admiralty court and is therefore to be regarded as a matter of procedure. But that conceals more than it reveals about the action. Most importantly it raises the question of the identity of the party sued in the action. If it is not the ship, as the personification theory maintains, then who is the party against whom the action is brought and what are the consequences of that party being sued? If it is the owner then why is service dispensed with save on the vessel? If it is the owner how does one explain those maritime liens that do not depend for their existence upon any liability of the owner? If the purpose of the action is to sue the owner why does it suffice to issue a writ (now a claim form<sup>7</sup>) and from that stage to say that the claimant enjoys a statutory right to proceed against the vessel notwithstanding a change in ownership prior to its arrest? Why does the existence of a judgment in an action *in rem* not operate to preclude a subsequent action *in personam*? What happens to the action if the owner is sequestrated or, being a company, placed in liquidation before the action is concluded? These questions must be borne in mind before accepting a too facile statement that the action *in rem* is merely a form of procedure against the owner of the vessel.

**(a) The procedural theory**

From the early Nineteenth Century the English courts drew a clear distinction between an action *in rem* and an action *in personam*.<sup>8</sup> An apparently firm foundation linking the action *in*

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<sup>7</sup> N Meeson, *Admiralty Jurisdiction and Practice* (3<sup>rd</sup> Ed, 2000) 125, para 4.1.

<sup>8</sup> *The Hope* 1W. Rob 154, 166 ER 531; *The Volant* 1W. Rob 383 388, 166 ER 618

*rem* to the maritime lien emerged in *The Bold Buccleugh*<sup>9</sup> where, in the classic statement of the nature of a maritime lien, Sir John Jervis CJ said:

‘A maritime lien is well defined...to mean a claim or privilege upon a thing to be carried into effect by legal process...that process to be a proceeding *in rem*. ... this claim or privilege travels with the things into whosoever’s possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached.’

He went on to say that:

‘A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and while it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper cause there a maritime lien exists.’

As subsequent writers have pointed out, however, there are considerable historical difficulties in suggesting such a close link between the action *in rem* and the maritime lien. Not least of these, as Marsden wrote in the balance of a passage quoted in chapter 2<sup>10</sup>, is that:

‘Scarcely a trace appears of the modern doctrine of arrest being founded upon a maritime lien; the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure and that its only object was to obtain security that judgment should be satisfied. The form of the article upon first decree shows that the defendant was always cited ‘at’ - *apud* - the goods or ship arrested, and that if he did not give bail to satisfy judgment the suit proceeded against him in his absence as well as against the *res*.’

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<sup>9</sup> *Harmer v Bell: The Bold Buccleugh* 7 Moo. PCC 267, 13 ER 884 (PC).

<sup>10</sup> Chapter 2, footnote 72, *supra*. An electronic search of the English Reports reveals that the expression ‘maritime lien’ was used for the first time in the report of a court in the United Kingdom in *The Bold Buccleugh*. The South African Law Commission Report on the Review of the Law of Admiralty erroneously says in paragraph 4.4 that: ‘Because of the existence of the maritime lien the Admiralty Court recognised a procedure against the ship by way of an action *in rem*’. In *Euromarine International of Mauren v The Ship ‘Berg’* 1984 (4) SA 647 (N) 653 E-F and in *Shipping Corporation of India Ltd v Evdomon Corporation Limited* 1994 (1) SA 550 (A) 560. the passage from *Halsbury*, which is still contained in the 4<sup>th</sup> Ed (2001 Reissue) Vol 1, para 305, ascribing the origins of the action *in rem* to the concept of the maritime lien is quoted, but it is hoped that when our courts are called upon to consider the nature of the action they will avoid this historical error. In an article by H Staniland, ‘*Roman Law as the origin of the Maritime Lien and the Action In Rem in the South African Admiralty Court*’, (1996) 2 *Fundamina* 285 the links between either of these maritime institutions and the Roman Law is examined and found to be fairly tenuous.



In addition proceedings for possession or restraint, neither of which have anything to do with a maritime lien, were proceedings *in rem*<sup>11</sup>. Whilst the concept of hypothecation of the vessel was not novel and indeed central to claims such as that under a bottomry bond, as appears from Browne's discussion of them<sup>12</sup>, the expression 'maritime lien' to describe the rights attaching to certain forms of claims seems to have its origin in judicial usage in the judgment of Justice Story in *The Nestor*<sup>13</sup> in 1831. Even if one accepts that this was eagerly taken up by the civilian lawyers of Doctors' Commons and was cited as accepted wisdom in *The Bold Buccleugh* it is not a basis upon which it is possible at this stage of the law's development and having regard to a fuller consideration of the historical material to construct our understanding of the action. Put bluntly to suggest that the action *in rem* is in some way an outgrowth of the maritime lien or that the two developed in tandem ignores history and this view appears increasingly to be accepted by writers in this field.

Since 1892 and the judgment in *The Dictator*<sup>14</sup> the approach in England has been to treat the action *in rem* as procedural in origin serving the primary purpose of impleading the owner of the vessel by arresting the vessel for the purpose of providing security for the claim and thereby compelling the owner to appear in order to defend the claim. In this sense it bears a close resemblance to the attachment *ad fundandam et confirmandam jurisdictionem* of the Roman

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<sup>11</sup> Coote, *op cit*, 3

<sup>12</sup> Browne, *op cit*, 195-8. He does not use the expression 'maritime lien' in his work.

<sup>13</sup> *The Nestor* 18 Fed. Cas 9 (No. 10126) (CCMe 1831); 1 Sumner 73. Justice Story referred to the Roman Law tacit hypothec and suggested that the privilege for necessities may have had its roots there although he himself recognised that this was more a borrowing from the language rather than the institutions of the Roman Law. He started from the tacit hypothec that a supplier of necessities had for so long as they remained in possession of the goods and pointed out that this would be a pointless remedy if the lien lapsed when the vessel sailed. He was particularly concerned that in the absence of such a lien it would be necessary for a master unable to pay for necessities to raise money on the security of a bottomry bond, a course he regarded as unbusinesslike and unduly costly. He used the expression maritime lien in his judgment but may have derived it from Lord Tenterden's work *Abbott on Shipping* (of the American edition of which he was the editor). Unfortunately no edition of that work predating the decision by Justice Story is available to me so I cannot verify the source.

<sup>14</sup> *The Dictator* 1892 P 304, 7 Asp MLC 251.

Dutch law, which as explained in chapter 2 evolved as a remedy to compel the appearance of the defendant, which in the maritime context meant the owner of the vessel in respect of which the claim arose, and that person's submission to the jurisdiction of the court. The conclusion in *The Dictator* was based primarily upon the history of prohibition, which ultimately had the effect of restricting the Admiralty Court to claims based on the arrest of the vessel or the giving of a stipulation or bail so that the action was always taken to be one against the *res*, and the description of the old practice which Jeune J set out as follows:

'In all actions in that court, the respondent if he appeared had to find bail for the amount in which the action was instituted, or go to prison, and then the action proceeded against him *in personam*, and if judgment went against him he was monished to pay the amount ordered...or if he failed to do so his bail ... the consequence of default being attachment ... If he did not appear ... his appearance could be enforced by seizure of any ship or any goods belonging or supposed to belong to him within the admiralty jurisdiction, the real owner being able to intervene and claim them. If after such seizure he appeared and gave bail ... the ships or goods were delivered over to him and the case proceeded *ut in actione instituta contra personam debitoris*. It would seem clear that the arrest in such cases was not limited to any particular property of the defendant on the seas; that the object of the arrest was to secure appearance and bail or provide a fund for securing compliance with the judgment and that, whatever was the value of the property or the amount of the bail, the defendant would be liable to pay and liable to be attached if he did not pay the full amount of the sum decreed against him. No doubt the main object of arrest whether of person or property, was to secure that bail should be given to satisfy the judgment.'<sup>15</sup>

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<sup>15</sup> *The Dictator*, *supra*, 311. This description was taken (although if Browne is correct not entirely accurately) from Clerke's *Praxis Curiae Admiralitatis Angliae* a work written by an admiralty proctor in the period of the Restoration and first published in 1667, with a second edition in 1743 and a number of editions thereafter. Whilst Clerke's *Praxis* is the subject of the criticism quoted by both Hebert P M, 'The origin and nature of maritime liens' (1929-30) 4 Tulane Law Review 381 392, fn 62 and Wiswall F L, *The Development of Admiralty Jurisdiction and Practice since 1800* (1970), 160 it has always been cited by English courts and writers as being authoritative. See Roscoe, *op cit*, 2 fn (c). Holdsworth, *op cit*, Vol XII, 628-9 describes Clerke's work as a very important book. Wiswall's primary criticism (*op cit* 165-16) is that the procedure described by Clerke is not the procedure in an action *in rem* but a procedure of maritime attachment similar to the action *in rem* but undertaken in execution of a judgment. The criticism is dependent upon the action *in rem* being linked to the maritime lien, which in my view is not historically correct, and the belief that there was in addition to and separate from the action *in rem* an admiralty attachment in an action *in personam*, which I also believe to be mistaken. (See Chapter 2, footnote 85, *supra*.) It is hardly a legitimate criticism, to complain that Clerke does not mention an expression used for the first time by an American judge many years after he wrote. Browne, *op cit*, in chapter IX dealing with the practice of the court relies extensively on the 5<sup>th</sup> edition of Clerke's *Praxis*, which suggests that he accepted it as an authoritative guide to the admiralty practice. In *Kent's Commentaries on American Law*, Vol 1, (14<sup>th</sup> Ed Gould, 1896) 380, fn (c) Chancellor Kent says: 'For a knowledge of the admiralty practice, I would refer the student to Clerke's Practice of the Court of Admiralty in England, which is a work of undoubted credit; and in 1809 a new edition was published in this

Two points need to be made about this decision. The first is that it was reached in response to a contention that in a claim for salvage, where judgment had been entered for more than the amount claimed and more than the amount of the bail to secure the release of the vessel, the judgment was only effective up to the amount of the bail and no more. In other words it was a case where the owner of the vessel had intervened to defend the claim and bail had been given to secure the release of the vessel. Accordingly it was not a situation where the owner of the vessel had not participated in the litigation. The second is that as with so many other judicial decisions, Jeune J's adoption of the concept that the action *in rem* is procedural in origin appears from the judgment to be motivated not least by an underlying sense of practicality. As he points out in the closing paragraph of the judgment:

‘I should have regretted if I had been unable to accede to the present motion, because, as it is clear that if plaintiff's claim is not satisfied by one kind of action, he can resort to another...[T]he only result of refusal would be to drive the plaintiffs to bring another action. But for the reasons I have given I think the present application may be granted in order to enable the plaintiffs to issue execution in the present action for the full amount of the decree which they have obtained.’

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country. I would also refer to the 2d volume of Brown's (*sic*) Civil and Admiralty Law ...’ Similarly the editors of *Fleetwood and Hale*, *op cit*, cxxxii-cxxxiii, say:

‘The other source is the description of the steps in an Admiralty suit set out in Francis Clerke's *Praxis*. There seems no reason to doubt that an Elizabethan proctor in Admiralty knew what he was writing about, yet his description has baffled many readers. He starts with the process of personal arrest to procure appearance which is elaborately described, but it is not until we reach Title 24(28) of the *Praxis* that he turns to process *in rem*, writing that if the defendant could not be arrested, as being out of the kingdom or having absconded, then a warrant could be had to arrest goods or such ship belonging to the defendant debtor in whose hands soever they were, and upon that attachment the defendant was to be cited. That the *in rem* procedure seems accorded such a secondary and subsidiary role has surprised many, and it has been explained not as the ‘action *in rem*’ but as an Admiralty attachment to advance an action which is properly *in personam*. But such an explanation leaves Clerke's description as lacking an originating process *in rem*.’ [I would add that it is inconsistent with Browne who specifically relies on Clerke in describing the action *in rem*.] The editors then continue:

‘The simplest and (it is submitted) more satisfactory, solution of this puzzle is to recall that in Admiralty there were no forms of action and no categories of procedures; there was a single *ordo* or form of action, though that form contained variants. It is clear from the warrants that Elizabethan plaintiffs in Admiralty might start with arrest of ship and goods; they not infrequently took out warrants in the same suit against both person and property. What Clerke describes is not an intermediate attachment where the defendant has absented himself nor an initial process available only where the plaintiff is absent despite his unfortunate language suggesting that arrest of the *res* was available only against absentees. Probably he intended only to indicate its obvious value and indeed necessity when the defendant was absent. The warrants make it perfectly plain the ship and goods could be arrested irrespective of

This passage illustrates the basic reality known to all practising lawyers that by and large courts prefer practical solutions to problems to fidelity to an abstract jurisprudential principle<sup>16</sup>. Provided the practical result can be achieved by an acceptable process of judicial reasoning a court is most likely to follow that route. Thus in *The Dictator* Jeune J could see no reason to compel the plaintiffs, who had obtained a judgment for £7500 on a claim for salvage, to institute a separate action to recover £2 500 of this amount, merely because when the ship was initially arrested it was released against the furnishing of bail in an amount of £5000.

The judgment in *The Dictator* was subjected to virtually immediate criticism by text book writers such as the editors of Williams and Bruce<sup>17</sup>, who wrote in 1902 that:

‘In former editions of this work a clear distinction was drawn between actions *in rem* and actions *in personam*, and it was stated that the remedy afforded by proceedings *in rem* cannot extend beyond the property proceeded against. That view was in accordance with the practice of the Court of Admiralty, and the generally expressed opinion of those familiar with admiralty procedure. But some recent decisions which appear to impeach that view render it necessary that the law affecting admiralty proceedings *in rem* should be carefully reconsidered.’

However, the English courts have repeatedly endorsed its central premise, that the action *in rem* is procedural in nature.<sup>18</sup> Nonetheless in regard to some aspects there were lingering traces of the notion of personification such as the principle that unless the owner entered appearance the

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the availability of the defendant personally. It was an alternative form of procedure, not a separate form of action.’

<sup>16</sup> This is consistent with modern approaches to law. As Robert Fisher QC notes in his article ‘*The Purpose of Admiralty Law*’ (2004) 18 *MLAANZ Journal* 14: ‘The modern trend is to place less emphasis upon formalism and more upon an articulation of the purposes for which a law exists.’

<sup>17</sup> Williams and Bruce *op. cit* 18. Mayers E C, *Admiralty Law and Practice in Canada* (1916) 11-24. Similar criticism, from an American perspective, is to be found in Hebert *op. cit* and Wiswall *op. cit*. It will be apparent that I regard much of this criticism as misconceived and dependent on a process of reasoning that starts with an assumption of a link between the action *in rem* and the maritime lien which history does not warrant. It also erroneously seeks to separate the action commenced by way of the arrest of the vessel from the action commenced by the arrest of other property. An examination of the historical record gives no indication that the two were separate actions

<sup>18</sup> *The Gemma* [1892] P 285, 8 Asp MLC 585 (CA); *The Duplex* [1912] P 8, 12 Asp MLC 122; *The Tervaete* 1922

action proceeded against the ship alone. Most recently, however, in the case commonly known as *The Indian Grace (No. 2)*,<sup>19</sup> the procedural view of the action reached its apotheosis when Lord Steyn said:

‘The procedural theory stripped away the form and revealed that in substance the owners were parties to the action *in rem*.’

and again:

‘The role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building. Fortunately the scaffolding can usually be removed with ease... The idea that a ship can be a defendant in legal proceedings was always a fiction.

But before the Judicature Acts this fiction helped to defend and enlarge admiralty jurisdiction in the form of an action *in rem*. With the passing of the Judicature Acts that purpose was effectively spent. That made possible the procedural changes which I have described. The fiction was discarded.

It is now possible to say that for the purposes of s34 [section 34 of the Civil Jurisdiction and Judgments Act, 1982] an action *in rem* is an action against the defendants from the moment that the Admiralty Court is seized with jurisdiction.’ (My insertion)

A brief consideration of the issue in *The Indian Grace (No 2)* and the reasoning of Lord Steyn, with whom the other members of the House agreed, is appropriate. The case concerned a shipment of munitions to India. There was a fire during the voyage and a small part of the cargo was jettisoned. On arrival and discharge at Cochin a claim was pursued for the loss occasioned by the short delivery of the jettisoned cargo and judgment was obtained in favour of the

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P 259 270, 16 Asp MLC 48 (CA) 55.

<sup>19</sup> *Republic of India v India Steamship Company Limited (Indian Grace)(No. 2)* [1998] 1 Lloyd’s Rep 1 (HL). Confusingly in the All England Reports it is reported as *The Indian Endurance (No. 2)*, *Republic of India and another v India Steamship Company Limited* (1997) 4 All ER 380 (HL). This is consistent with some earlier statements of the position. Thus in *Morgan v Castlegate Steamship Company: The Castlegate* 1893 AC 38; 7 Asp MLC 284 (HL) 288 Lord Watson said: ‘...every proceeding *in rem* is in substance a proceeding against the owner of the vessel’. In *The Tervaete*, *supra*, Scrutton LJ remarked that: ‘In my view it is now established that the procedure *in rem* ... is the means of bringing the owner of the ship to meet his personal liability by seizing his property.’ In saying this he was reiterating a view that he had put forward unsuccessfully as counsel in *The Burns* [1907] P 137, 10 Asp MLC 424, a case that will require reconsideration in the light of *The Indian Grace (No 2)*. See to like effect *The Deichland* [1989] 2 All ER 1066 (CA).

claimant. Thereafter an action *in rem* was brought in England claiming that all of the munitions delivered in Cochin had been damaged by the fire and rendered useless. The question considered by the court was whether this claim could be pursued in the light of section 34 of the Civil Jurisdiction and Judgments Act, 1982 that prohibited a further action where a judgment had already been given in favour of the claimant on the same cause of action in proceedings between the same parties or their privies before a foreign court.

Lord Steyn held that the action *in rem* was between the same parties and therefore that the claim was barred.<sup>20</sup> Fundamentally the reasoning of the court was that whatever its outward form an action *in rem* is from inception an action against the owner of the vessel. In reaching that conclusion reliance was placed on the form of the writ and in particular on the sovereign immunity cases of *The Cristina*<sup>21</sup> and *The Parlement Belge*<sup>22</sup> in both of which it was held that bringing an action *in rem* against a vessel owned by a foreign sovereign impleaded that foreign sovereign and infringed their sovereign immunity. There has been some attempt by critics of the decision to explain this on the basis that the members of the House in *The Cristina* used the word ‘impleaded’ in a special sense as meaning only that the sovereign state is by the writ called upon to sacrifice either its ship or its independence<sup>23</sup> but this is impossible to reconcile with the clear statement by Lord Atkin at the beginning of his speech that a foreign sovereign is impleaded when it is ‘*made against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property and damages.*’ (Emphasis added.) None of the other Law Lords expressed any reservations about the

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<sup>20</sup> The same question had been raised in *The Bold Buccleugh* and the Privy Council held that the action *in rem* in England in that case, based on a maritime lien and pursued after a change in ownership of the vessel, was a different action from the earlier action against the original owner of the vessel that had been pursued in Scotland. The case can only be distinguished on the ground that a maritime lien was in issue. It seems from a reading of the judgment, which is extremely terse on this aspect, that the Privy Council simply accepted that the claim *in rem* is against the ship itself because of its foundation in the maritime lien and that this serves to distinguish it from a claim *in personam* against the owner. It is only possible to reconcile this reasoning with the notion that proceedings *in rem* are from inception proceedings against the owner of the vessel on the basis that because the claim was based upon a maritime lien the new owner of the vessel had acquired it subject to the charge created by the lien and was therefore liable on the claim even though there was no personal liability.

<sup>21</sup> *Cia Naviera Vascongada v Cristina, The Cristina* [1938] 1 All ER 719 (HL); 19 Asp Mar Cas.159 (HL)

<sup>22</sup> *Parlement Belge, The* (1880) 5 PD 197 (CA); 4 Asp MLC 234.

correctness of this statement and a fair reading of the judgments suggests that they agreed with it. This passage seems destructive of the suggestion by Derrington and Turner<sup>24</sup> that the owners may have been impleaded but ‘did not become *parties* to the proceedings until they entered an appearance’.

This approach, that the action lies against the owners from the outset as opposed to being against the vessel from the outset and against the owners only once they enter an appearance to defend, is clearly controversial, with one commentator saying that:

‘Lord Steyn...said that the orthodox analysis of the action *in rem* put forward by successive Admiralty judges and others over the last century can no longer be supported. Whilst the House of Lords purported to follow and apply the decision of the Admiralty Court in *The Dictator*, the House in fact failed to apply that decision and ignored the manner in which the action *in rem* has been understood by the courts for over a century. Many procedural questions affecting the action *in rem* have long been settled. They may now be open to debate.’<sup>25</sup>

On the other hand Jackson says of the decision that ‘the House of Lords took a large step in recognising reality in analysing the action *in rem*.’<sup>26</sup> It is submitted that not only is this undoubtedly correct but it should help to dispel the clouds of mystification with which maritime

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<sup>23</sup> Nigel Teare QC ‘*The admiralty action in rem and the House of Lords*’ [1998] LCMLQ 33 at 39.

<sup>24</sup> Derrington & Turner, *op cit*, 27. This view had been expressed by Clarke J in the court of first instance. *The Indian Grace (No 2)* [1994] 2 Lloyd’s Rep 331 at 335.

<sup>25</sup> Teare, *op cit*. See also the comment by F. Rose ‘*The nature of admiralty proceedings*’, [1998] LCMLQ 27. West M, *Arbitrations, Admiralty actions in rem and the arrest of ships in the Hong Kong SAR: in the twilight of the Indian Grace (No 2)*, [2002] LMCLQ 259. The reader will notice the similarity between these criticisms and the judicial ones that followed that the settled understanding of the action *in rem* has been disturbed and the views of Williams and Bruce in regard to the effect of the decision in *The Dictator*. The approach taken by the court in *The Indian Grace (No 2)* would appear to require a reconsideration of the correctness of the result of the decision in *Harmer v Bell: The Bold Buccleugh*, *supra*; *The City of Mecca* (1881) 5 P 106; 4 Asp MLC 412; *The Longford* (1889) 14 PD 34 (App), 6 Asp MLC 371 and *The Burns* [1907] P 137, 10 Asp MLC 424. Derrington & Turner, *op cit*, 24-30, paras 2.35–2.47 are equally critical of the judgment although they accept in para 2.48 the central premise that the ship cannot be a party to litigation. That leaves unanswered the question addressed by Lord Steyn, namely, if the ship is not the defendant party to the litigation, who is?

<sup>26</sup> Jackson (4<sup>th</sup> Ed), *op cit* 259, para 10.15. He says, quoting Teare’s article, that the step ‘was bemoaned by some’. Brian Davenport QC in his note ‘*End of an Old Admiralty Belief*’ (1998) 114 LQR 169 welcomes the change and says that the fiction had outlived its usefulness although its abandonment leaves a number of questions to be answered. He correctly says that ‘...the fiction was always difficult to understand if not faintly absurd.’ Derrington

lawyers have been content to surround the action *in rem*. The effect of the decision will be to compel a clearer analysis of the substantive aspects of the action and its links to the maritime lien and the statutory lien (as it is commonly known) arising from the invocation of the court's jurisdiction in respect of one of the claims that founds such an action without giving rise to a maritime lien. There is no indication in the judgment that Lord Steyn was disposed to alter or abolish any of the 'substantive' consequences of the action *in rem*. His purpose was the simpler one of dispelling the notion that the action lies against anyone other than the owner of the vessel at the time of its arrest. Like Jeune J's decision in *The Dictator*, a strong practical spirit infuses the views of Lord Steyn concerning the nature of the action *in rem*. Rather than bemoan the decision it may be better to accept that the time has come to put an end to the fictions surrounding the action *in rem* and to accept the reality that if one arrests a vessel and makes it both the means of security for a claim and the means of satisfying that claim then one is in reality advancing a claim for which the owner of that vessel is being made liable. That approach will, as the discussion below indicates, require that hallowed aspects of the action *in rem* be revisited and their conceptual foundation re-examined, but if that leads to a clearer and more realistic concept of the action *in rem* the exercise will be valuable.

One of the questions to which it will be necessary to return is whether the action *in rem* constituted and recognised under the South African Act has the characteristics laid down in cases prior to *The Dictator*, as contended by writers such as Hofmeyr, who refers to it as restoring the logic of the early English admiralty law in relation to the nature of the action *in rem* and proceeds to describe it in the terms of personification,<sup>27</sup> or those characteristics recognised in *The Dictator* and those cases that followed it, or whether the view of the action taken in the *Indian Grace (No 2)* is applicable in this country. For the present we can accept that the above reflects the current view of English courts on the general nature of the action *in rem* although its implications have not been the subject of further judicial consideration in England and it has

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& Turner, *op cit*, para 2.47, fn 125 cite the article but are strongly critical of the reasoning that led Lord Steyn to his conclusion.

<sup>27</sup> Hofmeyr G, Admiralty Jurisdiction: Law and Practice in South Africa (2006) 51-53.



been viewed unfavourably in New Zealand<sup>28</sup>, Singapore<sup>29</sup> and Australia<sup>30</sup>.

Although further debate may alter this view, at present it appears that once the history is explored these statements of the basis of the action *in rem* in England have never departed from its original civilian foundation and when the status of the court was reaffirmed and its jurisdiction extended and secured both the forms and the rules reverted largely to their ancient origins and the ancient understanding of the proceedings in admiralty as being against a particular person, fortified by the arrest of that person's property. When Jeune J came to consider this in *The Dictator* he endorsed the understanding of the action *in rem* as a procedure whereby the owner of the vessel was brought before the court to answer a claim for which the owner was liable. That approach has in turn been viewed through a modern prism in *The Indian Grace (No 2)* and taken to a new but apparently logical conclusion. It is the implications of that approach for the substantive law consequences attributed to the action that have in the past led to debate concerning the nature of the action *in rem* and its relationship to the maritime lien and the decision in *The Indian Grace (No 2)* has revived that debate.

(b) **The substantive aspects of the action *in rem***

Both Thomas<sup>31</sup> and Jackson<sup>32</sup> argued before the decision in *The Indian Grace* that the action *in rem* has substantive elements. As such Thomas said it is 'patently distinct'<sup>33</sup> from the action *in personam* although Jackson's views were more pragmatic than dogmatic, drawing attention to flaws in the approach of both dominant theories of the action. Closer inspection

<sup>28</sup> *The 'Irina Zharkikh and Ksenia Zharkikh'* [2001] 2 NZLR 801; [2001] 2 Lloyd's Rep 319.

<sup>29</sup> *Kuo Fen Ching and Another v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 3 SLR 721; [1999] SGCA 95

<sup>30</sup> *Comandate Marine Corp v Pan Australia Shipping (Pty) Ltd* [2006] FCAFC 192.

<sup>31</sup> D R Thomas, *Maritime Liens* (1980) 38-41.

<sup>32</sup> Jackson D C, *The Enforcement of Maritime Claims*, 2<sup>nd</sup> Ed. (1996) 381-5. He now appears to favour the approach in *The Indian Grace* as a step towards a more logical approach to the action *in rem*.

<sup>33</sup> Thomas, *op cit*, 39. The cases of *The Longford* and *The Burns* on which he relies in asserting this difference will,

suggests that in many if not most instances the distinction between the two forms of action is not clear-cut or even readily apparent and where the vessel is either not arrested or released from arrest against the provision of security it is virtually non-existent. In practical terms, save for any benefit flowing from the advantage of timing, there is little outward difference between a judgment *in personam* followed by the sale in execution of the vessel and a proceeding *in rem* where the vessel is arrested at the outset and is available to be sold either immediately or once judgment has been obtained. Participation by the owners in the litigation does not alter the consequences for the owner of a judgment and the sale of the vessel. In either an action *in rem* or an action *in personam* if the owner of the vessel is unable to mount a successful defence to the claim or to satisfy the judgment once given the ship will be sold and the judgment executed against it subject always to the existence of other claims and questions of priority.

The principal advantage of proceeding *in rem* as opposed to proceeding *in personam* is that one's claim becomes secured in advance of the litigation<sup>34</sup> and that the security once established protects the claimant against subsequent changes in ownership. That is an advantage that will influence the choice of procedure but is not itself a matter of substantive law attaching to the procedure itself as opposed to a procedural advantage that has been recognised in both England and South Africa.<sup>35</sup> Far be it for me to discount that advantage (which may prove ephemeral if other prior claims come forward before judgment or distribution of the proceeds of the sale of the vessel) but it does not mean that an action *in rem* is not procedural in nature. It is erroneous to identify the security with the procedure adopted to obtain that security. Nor, with respect to those who suggest otherwise, is it correct to say that the procedure becomes

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as pointed out earlier, have to be reconsidered in the light of *The Indian Grace* (No 2).

<sup>34</sup> An advantage recognised by Coote, *op cit*, 131-2 when he says that: '... no prudent person will hesitate to proceed *in rem* if the *res* be within the jurisdiction of the Court, so a personal proceeding is never adopted unless the *res* be inaccessible to arrest.'

<sup>35</sup> *Spiliada Maritime Corporation v Cansulex Ltd*; *The Spiliada* [1986] 3 All ER 843 (HL) 854-856; [1987] 1 Lloyd's Rep 1.; *Mt Tigr: Bouygues Offshore SA and Another v Owners of the MT Tigr and Another* 1998 (4) SA 740 (C) 744.

substantive because the action is the only means available to enforce a maritime lien<sup>36</sup>, or because once it is instituted in respect of a statutory claim *in rem* the claimant has a secured claim, or because it is only the vessel itself that can be arrested in an action on a maritime lien or a claim in respect of ownership, possession or mortgage. That ignores the reasons why those effects flow from its invocation for those purposes. Noting that the distinction between what is procedural and what is substantive is notoriously slippery,<sup>37</sup> it is of more assistance to identify the aspects attendant upon the institution of an action *in rem* that are said to involve matters of substance and to try and place them in an appropriate juridical context in the light of the provisions of the Act. In this way it may be possible to identify whether and, if so, where the procedural theory of the action creates difficulties or overthrows accepted rules or whether these can now be viewed in a new and clearer light.

It is one thing to say that in order for a claim to enjoy certain consequences that claim must be pursued by a specific procedure and an entirely different thing to say that the procedure is itself a matter of substantive law. In South Africa law an application to perfect a pledge or a notarial bond or a cession of book debts *in securitatem debiti* is undoubtedly a proceeding *in personam* (in the sense used in Admiralty in England in that it is one pursued against a named party) but it is directed at establishing a security interest in specific things and results in the attachment of substantive law rights to the claim. It seems erroneous and unnecessary to detach the substantive consequences from their underlying source in contract and the consequent claim and attach them to the procedure by which the creditor pursues the claim. The substantive consequences arise from the contract and attach to the claim and benefit the claimant. They are not part of the procedure although that procedure may have to be followed in order to secure the

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<sup>36</sup> Which is not the case in South Africa where a maritime lien can be enforced by *in personam* proceedings where the owner of the vessel is personally liable on the claim giving rise to the lien.

<sup>37</sup> *Euromarine International of Mauren v The Ship 'Berg'* 1986 (2) SA 700 (A) 710G-H quoting the judgment of the Board in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) 836. Mokgoro J described it as an illusory distinction in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) paras 34 and 49. *Transol Bunker BV v MV Andrico Unity and others Grecian-Mar SRL v MV Andrico Unity and others* 1989 (4) SA 325 (A) 348H-349E.

benefits in question.<sup>38</sup> Similarly the statutory classification of a claim as a maritime claim clears the way for the claimant to pursue the claim by way of an action *in rem* with the advantage of a statutory lien but it is wrong and unnecessary to ascribe the advantage afforded a claimant by the lien to the form of proceedings rather than to the statute from which it is derived. If a clear distinction is maintained between the underlying claim and the advantages attaching to a claim of that type from whatever source they may arise, and the procedure that must be used in order to secure those advantages, this may enable us to undertake an analysis that is no longer dependent on outdated and artificial concepts such as the personification of the vessel and to give effect to practicalities, without sacrificing the advantages that have always flowed from the action *in rem*.

The adoption of a similar approach in the light of *The Indian Grace (No 2)* leads Professor Jackson to say the following:-

‘17.40 Focus on the action *in rem* rather than the lien has led to confusion in English law between provisional measure (arrest), jurisdiction to consider a claim (through the action *in rem*), the interest being enforced (lien) and enforcement (judicial sale). Part of the confusion is the linking of jurisdiction to the type of action rather than the type of claim. Just as in truth the action *in rem* is the method of enforcement of the maritime lien attached to specific claims, so it should be recognised as having an identical function for claims attracting a statutory lien in Admiralty. The focus would then be on the characteristics of the claim assessed as being one to which a security interest is attached. Priorities could then be allocated according to the claims.

17.41 A considerable step towards recognition of the nature and role of the action *in rem* was taken by the House of Lords in 1997 in *The Indian Grace (No. 2)* that the time had come to discard the fiction that an action *in rem* was not against the owners of a ship but against the ship. But a perceived possible problem in the enforcement of some maritime liens against the ship without liability of the owner *in personam* or despite a sale was simply set aside as not relevant to the case.

17.42 With respect it surely was as relevant to the principle on which reliance was placed

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<sup>38</sup> Scott LJ in *The Tolten, supra*, says: ‘The positive principle of the automatic attachment to the ship of the creditor’s lien upon it is ... indubitably a rule of substantive law in Admiralty.’ The lien is that of the creditor but it requires to be enforced by a particular procedure. Even that is debatable in South Africa where the order of priorities is statutory and where, even if a person enjoying a maritime lien had initially proceeded *in personam*, they would be entitled to claim a preference on distribution of the proceeds of the sale of the vessel on the basis of the existence of their maritime lien.

as explicable. Once the claim and not its method of enforcement takes centre stage there is no problem - simply differing characteristics of different claims. A liability in respect of a proprietary interest simply because of that interest is hardly novel. While it was not relevant to the precise circumstances of the claim in the case it surely is desirable for a court fundamentally analysing a fundamental concept to indicate how apparent inconsistencies with that concept are to be approached. It is unfortunate that not only did the House put maritime liens on one side, but also took no account of the enforceability of a statutory lien in Admiralty despite the sale of a ship. In that context it may be that an action *in rem* (other than a maritime lien) may result in 'liability' despite there being no liability *in personam*. So the next step is to give the action *in rem* and the lien their appropriate roles.'

It is interesting for the lawyer operating in a civilian system, where such a distinction between the rights attaching to a particular type of claim and the procedures by which they are enforced is by no means unknown, to compare Jackson's exposition of the effect of the decision in *The Indian Grace (No 2)* with the original statement of the nature of a maritime lien in *The Bold Buccleugh*. In both critical passages from the judgment of Sir John Jervis CJ quoted above a clear distinction is maintained between the maritime lien as a right of security attaching to particular property and the procedure whereby that right is given effect. There is no reason why the same analysis should not be undertaken in relation to the right of security accruing from the institution of an action *in rem* in respect of a maritime claim that does not carry with it a maritime lien. Had that analysis been maintained perhaps much of the confusion regarding these concepts (and much of the mystique) would have been dispelled a long time ago.

The analysis by Jackson seems undoubtedly correct in the light of the decision in *The Indian Grace (No2)* and it is indeed unfortunate that the court did not go a little further to spell out the consequences of its views in relation to matters such as the maritime lien rather than putting that on one side as a special case. If the action *in rem* is separated from the claims in respect of which such an action lies and any special rights attaching to those claims, whether by way of a maritime lien or otherwise, many of the criticisms addressed to the characterisation of the action *in rem* as being procedural fall away. If the maritime lien and the action *in rem* are taken to be distinct then there is no reason why the lien should not be indelible and travel with the vessel irrespective of any change in ownership. That, as Tetley points out, is merely a

characteristic of such a privilege or lien. Nor does it necessarily follow, as has been suggested,<sup>39</sup> that if the action *in rem* is purely procedural the plaintiff should be allowed to institute such an action by arresting other property of the owner within the jurisdiction. That approach presupposes that every procedure available for the purposes of litigation of one type should automatically be available in other cases but this involves a relentless logic in civil procedure that is rarely present. One can equally argue that because in admiralty one can commence proceedings by arresting a vessel one should, in any case where there is a foreign defendant, be able to arrest any property of the defendant in order to commence the action. That was the original position in English admiralty proceedings and is the position in Roman Dutch law in terms of the attachment *ad fundandam et confirmandam jurisdictionem*. It was also the position in Continental jurisdictions in maritime matters prior to the Arrest Convention. However in 1855 Dr. Lushington noted that the procedure of arrest of the person of the debtor had become obsolete (he could not recall an instance later than 1780).<sup>40</sup> After the arrest of person or goods other than the vessel had fallen into desuetude and not been used for over 150 years it would have taken more than logic in the area of civil procedure to persuade the Court of Appeal in *The Beldis*<sup>41</sup> to revive them. The Court's view of the practicalities of the situation appears to have influenced the judgment as indicated by the statement of Sir Boyd Merriman P that he was:

‘... not prepared to ‘reopen the floodgates of Admiralty jurisdiction’ upon the public, especially when that public is an international public, and I can see that the innovation would be disastrous to the prestige of the court.’

The difficulties with the characterisation of the action *in rem* as a form of procedure arose in the first instance from statements that tied the action *in rem* to the substantive rights attaching to a claim that was said to give rise to a maritime lien. In those countries, such as the United State of America, where this linkage is held to be important the result has been that by statute the

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<sup>39</sup> Price G, *Law of Maritime Liens* (1940)14-15.

<sup>40</sup> *The Clara* (1855) Sw 1, 3, 166 ER 986.

status of maritime liens has been conferred upon claims which did not previously enjoy that status and do not universally enjoy that status. By contrast in England where the procedural theory has been adopted there is a history<sup>42</sup> of making the action *in rem* available for the purpose of pursuing claims which do not enjoy the attributes of a maritime lien.<sup>43</sup> The primary consequence of these different approaches has been that courts have had to struggle with a consideration of the proper characterisation for the purposes of their domestic law of privileges or maritime liens afforded by the law of a foreign country.<sup>44</sup> The potential dilemmas occasioned by the action *in rem* falling into one of four different categories<sup>45</sup> do not appear to have occasioned any particular problems in practice. This is largely because in cases where security is furnished and judgment is obtained the claims are paid and secondly because there is no endeavour in such proceedings to attribute immutable substantive law consequences to the action. Rather, as Professor Jackson points out the action *in rem* has been viewed with 'subjective pragmatism'.<sup>46</sup> That approach is likely to commend itself to a South African court faced with the task of identifying the nature of the action *in rem*, particularly when it lies against an associated ship, where resort to previous characterisations are unlikely to provide definite answers.

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<sup>41</sup> *The Beldis* [1936] P 1, 51.

<sup>42</sup> Commencing with the Admiralty Act 1840 (3 & 4 Vict. c. 65) and the Admiralty Act, 1861 (24 Vict. c. 10) that extended the admiralty jurisdiction to additional claims without conferring a maritime lien. This is equally true of the position in South Africa.

<sup>43</sup> *The Heinrich Björn* 11AC 270, 285-6; 6 Asp MLC 1 (HL).

<sup>44</sup> See for example *The Colorado* [1923] P 102, 16 Asp MLC 145; *Todd Shipyards Corporation v Altema Compania Maritima SA and the ship 'Ioannis Daskelalis'* [1974] 1 LL L Rep 174 (Can Ct); *Bankers Trust International Ltd v Todd Shipyard Corporation: The Halcyon Isle* [1980] 3 All ER 197 (PC).

<sup>45</sup> Wiswall, *op. cit* 195-196. Thomas, *supra*, para 66, 42-3 notes that in cases where security is furnished there may be no arrest at all and the resemblance of the action to the 'traditional' concept of an action *in rem* becomes remote.

<sup>46</sup> Jackson (2<sup>nd</sup> Ed) *op. cit* 384. Whilst maintaining the approach that there are necessarily substantive elements to the action *in rem* Jackson pointed out that the American personification theory 'is destroyed by common sense in that in the end those who have interests in the ship (especially the owners) suffer through any enforcement of claims against the ship. Particularly is this so when the ship is liable to forced sale.' This seems to be the very point made by Lord Steyn in *The Indian Grace*, *supra* and endorsed by Jackson in the later editions of his book. He rightly draws attention to the policy elements that underpin judicial decision-making in this field. It is suggested that policy

(c) **The problem with personification**

The origin of the notion that the action *in rem* can be explained on the footing that there is a deemed personification of the vessel so that the court is not concerned with the persons who stand behind the vessel as its owners lies in the history of the conflict between the admiralty courts and the common law courts in England and the endeavour by the latter to restrict and restrain the jurisdiction in admiralty proceedings. As the noose of prohibition tightened, the response of the admiralty court was increasingly to assert that the action was only against the vessel, a form of proceedings not available in the common law courts, and the old Roman Law classification of proceedings as being either *in rem* or *in personam* was called in aid, inaccurately as already explained, to describe the form of the action. However, as pressure from the common law courts waned and the jurisdiction was put upon a statutory footing the action became available in a broader range of cases. Understandably the endeavour was made to accommodate the new claims within the old framework and new theories were devised to explain that framework. In devising these theories the civilian roots of the action were explored and an endeavour made to explain the action and its attributes within that legal tradition. The framework proved conceptually acceptable on the basis of the claim being against the vessel until it became necessary to go behind that concept to address new problems arising from the application of old legal rules. That is what happened in *The Dictator* and it forced the beginning of a revision of the underlying concept, conveniently labelled as a procedural theory of the action and contrasted with the notion of personification. That set the stage for a century of theoretical contestation that still continues.

As will be apparent the principal puzzle created by English courts stressing to the procedural nature of the action *in rem* flows from the undoubted fact that in a number of ways the consequences of invoking the procedure are either to confirm or to confer substantive rights upon the claimant party. That is most notably the case in the classic statements of the nature of a

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and practicality will always trump principial purity in this area of the law.



maritime lien quoted above. Notwithstanding the fact that the lien so described manifestly affords substantive rights to the holder of the lien, both as to the ability to recover on the claim giving rise to the lien and in the ranking of that claim in competition with other claimants, it too has been held to be procedural in nature.<sup>47</sup> It is hardly surprising that people are puzzled when the courts say that both the action *in rem*, that must be invoked in order to give effect to a maritime lien, and the maritime lien itself are procedural, when the latter so clearly affects the substantive rights of the claimant.

The gradual extension of the maritime jurisdiction of the admiralty court effected by the Acts of 1840<sup>48</sup> and 1861<sup>49</sup> did not have the effect of creating new maritime liens,<sup>50</sup> although there was a perception that they had done so. Nonetheless the statutory claims were held to vest claimants with substantive security rights in that once the writ *in rem* is issued and the proceedings commenced the claimant is entitled to pursue its claim against the vessel by arresting it and if need be by its sail, notwithstanding a change of ownership after the issue of the writ.<sup>51</sup> This is so even if service has not been effected and the change in ownership occurred without knowledge of the claim.

In both these instances the substantive security rights<sup>52</sup> flowing to the claimant from the invocation of the *in rem* procedure are created by the invocation of the process although it has been said that they flow from the process itself.<sup>53</sup> On this basis it is then said that it is impossible

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<sup>47</sup> *Bankers Trust International Limited v Todd Shipyard Corporation : The Halcyon Isle* [1980] 3 All ER 197 (PC).

<sup>48</sup> Admiralty Court Act 1840 (3 & 4 Vict. C65)

<sup>49</sup> Admiralty Court Act, 1861 (24 Vict. C10).

<sup>50</sup> *The Heinrich Bjorn* 11 AC 270 6 Asp. MLC1 (HL)

<sup>51</sup> *The Monica S* [1967] 3 All ER 740 (QBD).

<sup>52</sup> Or 'property rights' as they are known in English law.

<sup>53</sup> SC Derrington & J M Turner *The Law and Practice of Admiralty Matters* (2007) 15, para. 2.16. The authors ascribe the same view to D C Jackson, *Enforcement of Maritime Claims* (4<sup>th</sup> ed. 2005) para. 17.36 but with respect

to characterise them as procedural in nature albeit that they arise from procedural steps attendant upon the commencement of litigation. The answer perhaps lies in the observation by a South African judge that the cases that hold simply that the action *in rem* is a form of procedure are at best guilty of over-simplification.<sup>54</sup> On the other hand as Jackson remarks ‘focus on the action *in rem* instead of the lien is to focus on the method of enforcement of an interest rather than the interest being enforced’.<sup>55</sup> It seems that in *The Indian Grace (No 2)* Lord Steyn was so concerned with seeking to dispel once and for all the romantic notion that invested a ship not only with a life of its own but with a personality and the status of a litigant in courts of law, that he underplayed the consequences of this analysis. The fact that he did not deal with the important substantive consequences of instituting an action *in rem* left his analysis incomplete and less than satisfying. That needs to be borne in mind as South African courts seek to define for this jurisdiction the concept of the action *in rem* in admiralty, both as a conventional action *in rem* and as an action *in rem* against an associated ship.

The reference in the previous paragraph to a ‘romantic notion’ will readily convey that I regard the personification theory adopted by United States courts as a jurisprudential cul-de-sac. Whilst it may be doubted whether a modern court, as opposed to one at the turn of the twentieth century, would express itself in the following terms:-

‘Prior to her launching she is a mere congeries of wood and iron - an ordinary piece of personal property ... In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and become a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name.’<sup>56</sup>

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that does not appear to be a completely accurate reading.

<sup>54</sup> *SA Boatyard CC (t/a Hout Bay Boatyard) v The Lady Rose (formerly known as the Shiza)* 1991 (3) SA 711 (C).

<sup>55</sup> Jackson, *op cit*, para 17.38, p 467.

<sup>56</sup> *Tucker v Alexandroff* (1902) 183 US 424, 438. I am indebted to Derrington & Turner, *op. cit.* para 2.28 for the quotation. In 1960 the United States Supreme Court cited the following statement from O W Holmes, *The Common Law*: ‘A ship is the most living of inanimate things. Servants may sometimes say ‘she’ of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such

the personification theory continues to hold sway in US courts. There are however indications that if confronted with the type of problem that came before the House of Lords in *The Indian Grace (No 2)* the court may find it necessary to depart from theory and to examine more closely the nature of the action. In *Continental Grain Co v Barge FBL-585 et al*<sup>57</sup> it was confronted with an application to transfer certain proceedings brought both *in personam* against the owner of the barge and *in rem* against the barge itself from New Orleans (where the barge was when security was given to prevent its arrest) to Memphis, where the incident giving rise to the claim had occurred and where the barge owner had commenced proceedings against Continental Grain for damage suffered by the barge as a result of negligence in loading the barge. Under the relevant provision the proceedings could only be transferred if they could originally have been brought in the transferee court. It was argued by Continental Grain that they could not have brought the *in rem* proceedings in Memphis, because the barge was not present there and this precluded an order to transfer the proceedings at all.

The majority of the Court, in a judgment by Justice Black, rejected this contention based as he said upon ‘a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment.’<sup>58</sup> It cited cases dealing with the limitation statute in which it had been said that:

‘To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. In the matter of liability, a man and his property cannot be separated.’<sup>59</sup>

and:

‘The riddle after more than half a century repeated to us in a different context does not appear to us to have improved with age. There could be no practical exoneration of the

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extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.’ The analogy is dated and probably no longer correct even in houses that have the benefit of servants and the custom of referring to ships in the feminine is also diminishing.

<sup>57</sup> 364 US 19 (1960).

<sup>58</sup> And citing the passage from Holmes quoted in footnote 72.

<sup>59</sup> *The City of Norwich* 118 US 468, 503.

owner that did not at the same time exempt his property.’<sup>60</sup>

Flowing from this Black J said that a commonsense approach would be adopted and concluded that:

‘Although the action in New Orleans was technically brought against the barge itself as well as its owner, the obvious fact is that, whatever advantages may result, this is an alternative way of bringing the owner into court. And although any judgment for the cargo owner will be technically enforceable against the barge as an entity as well as its owner, the practical economic fact of the matter is that the money paid in satisfaction of it will have to come out of the barge owner’s pocket – including the possibility of a levy upon the barge even had the cargo owner not prayed for ‘personified’ *in rem* relief.’<sup>61</sup>

The view of the majority was the subject of a powerful dissent by Whittaker J (concurrent with Douglas J) in which he asserted the traditional view that:

‘This court has consistently held that an admiralty proceeding *in rem* is one essentially against the vessel itself as the debtor or offending thing; and, in such an action, the vessel itself is impleaded as the defendant, seized, judged and sentenced.’

It is difficult to know what to make of this. Is it to be regarded as merely an incidental decision on a matter of procedure and statutory interpretation having no general application or does it signal that US courts will follow the practical inclinations of the House of Lords, when confronted with unacceptable practical consequences of the personification of the vessel as litigant? For one not steeped in the niceties of admiralty proceedings in the USA it is difficult to tell.<sup>62</sup> However it is interesting to note that even in the jurisdiction that most firmly adheres to the notion of personification there are instances where its impractical extremes become unacceptable.

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<sup>60</sup> *Consumers Import Co v Kabushiki Kaisha Kawasaki Zosenjo* 320 US 249, 253-254.

<sup>61</sup> At 26.

<sup>62</sup> The judgment is cited by Force *et al*, *Admiralty and Maritime Law* as placing a question mark against the personification theory. On the other hand Sharpe D J and Berns P A in their contribution to Vol 5 of *Benedict on Admiralty* entitled *Practice and Procedure – Maritime Arrest* say: ‘While personification has been criticized by United States judges and commentators, neither United States courts nor the Congress seem inclined to abandon the doctrine ...’

It is in my view impossible in the real world to avoid Lord Steyn's strictures on this approach that personification is a mere fiction concealing the real identity of those who are in fact the targets of actions brought *in rem* against a ship. Whether in dismantling the fiction - the scaffolding surrounding the building as he described it - he overlooked the fact that in some respects the edifice of the action *in rem* still required its support, is the interesting question. Most commentators on the decision in *The Indian Grace (No 2)* seem to suggest that it does. However, that of itself is an insufficient reason to maintain a fiction that all concerned recognise is just that. To do so is not conducive to clarity of thought about legal problems and inevitably leads to difficulties when practical realities in a changing world confront ancient doctrine cloaked in the language of fairytales.

### 3 THE POSITION IN SOUTH AFRICA.

Fortunately in view of the lack of analysis in either the cases or the academic writing on the topic, South African courts have not yet made a commitment to either theory<sup>63</sup> although there are some Cape cases that have, rather formulaically said that the action *in rem* 'is an action against the ship itself'.<sup>64</sup> These statements were, however, made rather in passing and without any attempt to analyse the background issues or to explore the consequences of these statements for the nature of the action itself. It is submitted that they do not preclude South African courts from charting their own course in this area. In doing so it is submitted that the starting point should be those provisions of the Act that relate to the action *in rem*. These place the action

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<sup>63</sup> Milne JP wisely declined to choose between the procedural and personification theories in the '*Berg*' (NPD), *supra*, 654G-655C.

<sup>64</sup> The *m.v. Zlatni Piasatzi: Frozen Foods International Limited v Kudu Holdings (Pty) Limited and Others* 1997 (2) SA 569 (C) at 575B where Conradie J said that 'the security arrest, like the arrest under s3(5) is a device for bringing a *res* - and not a person - before the Court.' This view was endorsed in the *m.v. Rizcun Trader (3) Manley Appledore Shipping Limited v m.v. Rizcun Trader* 1999 (3) SA 966 (C) at 975A. A more measured view is that of Scott J in *SA Boatyards CC (t/a Hout Bay Boatyard) v The Lady Rose (formerly known as the Shiza)* 1991 (3) SA 711 (C) at 716B where he quoted with approval Professor Jackson's view of the action *in rem* as having a 'curious hybrid nature' and said that whatever the true nature of the action *in rem*: '... it is at least clear that the action cannot be regarded as simply an action against a *res* without reference to the owner or person having an interest therein.' In the result he held that the action lay sufficiently against the owner of the vessel to entitle that owner not

squarely within the realm of procedure. Section 3 containing the associated ship provisions is headed “Form of Proceedings”. Two modes of bringing suit are identified – the action *in personam* and the action *in rem*. The provision that introduces the associated ship is section 3(6) providing that an action *in rem* may be brought by arresting an associated ship instead of the ship in respect of which the maritime claim arose. Arrest, like attachment, is a procedural issue and a prerequisite for the commencement of the action *in rem* unless security is given to prevent an arrest, in which event there is a deemed arrest of the vessel in terms of section 3(10) of the Act. Overall the structure of the Act suggests that an action *in rem* is a form of procedure without addressing any of the issues surrounding that approach.

The logic of saying that an action *in rem* lies against the owner of the ship because the owner will ultimately suffer the loss if the action succeeds is apparent and appealing. The difficulty with it and the ground for criticism of the procedural theory is that it fails to provide an explanation for a number of disparate features of the action and in particular fails to explain or justify those situations, such as the maritime lien or (in England and elsewhere) the rule that the statutory lien attaches when the writ is issued and not when service occurs, so that if there is a change of ownership the new owner is burdened with the statutory lien, where the owner of the vessel may not be personally liable for the claim giving rise to the action. Nor does it explain other features of the action that are well-settled in practice and have never been questioned such as the fact that service on the owner is unnecessary or that the claim does not merge with the judgment *in rem* and may found a separate action against the party personally liable, or that, if the owner is personally liable in respect of the claim but does not enter an appearance to defend the action, the judgment is limited to the value of the *res*. Whether and to what extent all these features attach to the action *in rem* in South Africa will be discussed in the next chapter, but for the present they will be taken at face value as presenting a stumbling block to the procedural theory of the action *in rem*.

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only to defend the proceedings but also to bring his own claim in reconvention against the plaintiff.

A problem with the criticism of the procedural theory is that it seeks to impose a construction on the notion of the action being a procedure to implead the owner that it was never intended to bear. It is debatable whether the courts responsible for propounding this view of the action *in rem* were particularly concerned to enunciate a broad ranging theory providing a comprehensive explanation of the nature of the action. A careful reading of the decisions in *The Dictator* and *The Indian Grace (No 2)* suggests that their purpose is more modest and can more appropriately be described as an exercise in characterisation of the action within the context of the broad conceptual distinction between procedural and substantive law, elusive though that distinction may be. Both judgments address a basic question of the identity of the party being sued rather than making any attempt to propound a general explanation of the nature of the action. That was the relevant question in *The Dictator*, because the issue was whether judgment could be entered for the full amount of the debt when the owner of the vessel was before the court. It was also the relevant question in *The Indian Grace (No 2)*, where the issue was whether the proceedings instituted in England were between the same parties as the proceedings already pursued to completion in India. It is for that reason that it has already been suggested that the effect of the latter judgment is to cast doubt on the continuing correctness of the decisions in *The Bold Buccleugh*<sup>65</sup>, *The Longford*<sup>66</sup> and *The Burns*<sup>67</sup> all of which depended in the result on the court holding that an action *in rem* is fundamentally different and distinct from an action against the owner of a vessel.

If the procedural concept of the action *in rem* – a more modest but also a more accurate description of the actual decisions in the cases under discussion - is accepted as a starting point in approaching and explaining the action then the existence in certain circumstances of an entitlement to pursue a claim in this form notwithstanding the absence of any personal liability on the part of the owner must find its explanation and its justification in the creation of the security interest underpinning the claim. Similarly the limitations upon the scope of the action must be found in historical reasons and potentially in practical reasons concerning the

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<sup>65</sup> *Harmer v Bell: The Bold Buccleugh* 7 Moo PCC 267; 13 ER 884 (PC).

<sup>66</sup> (1889) 14 PD 34 (App)

<sup>67</sup> [1907] P 137.

enforcement and enforceability of judgments rather than in some intrinsic quality of the action *in rem* that distinguishes it from other forms of procedure. It is unnecessary then to speak of the action in its 'pure' form or to try to explain all of the consequences of such an action within a single grand theory, an exercise that like the physicists search for a theory of everything<sup>68</sup> may prove elusive and possibly ultimately fruitless. One can understand the desire to provide a comprehensive explanation and theoretical base for an institution of such significance and it may be helpful conceptually in addressing new problems as they arise. However in the ultimate analysis issues of policy and practicality intrude and it is rare for a judge or lawyer to decide a case purely on the basis of a theoretical exposition of basic principle. As Tetley says 'theories are nothing more than a skin or covering which their proponents have attempted to place around an already formed body of law'.<sup>69</sup> They are helpful as analytical tools that enable us to identify potential problems or flaws in reasoning and perhaps can assist in addressing new problems, but ultimately any theory is likely to prove inadequate to describe all elements of a legal institution.

A more helpful approach is to take as a starting point the fact that we are dealing with a form of action available in respect of a defined and therefore limited class of claims, itself subject to alteration by the legislature, and carrying with it certain advantages and limitations that have their origin in history but are moulded in South Africa by the terms of our own statute interpreted in the light of the common law, with its civilian roots and its own procedure for founding or confirming jurisdiction by way of the attachment of property. Overall the understanding of the nature and effect of the action *in rem* will have to be shaped by the spirit, purport and objects of the Bill of Rights and the construction of the Act will in material respects be affected by the provisions of the Constitution and limits imposed by the provisions of the Bill of Rights. It is unnecessary for that purpose for South Africa to resort to a fictional construct of a

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<sup>68</sup> See Stephen W Hawking, *A Brief History of Time* (1988), Chapter 10. In the forward to his subsequent book *The Universe in a Nutshell* (2001) he said that what had appeared to be 'just over the horizon' in 1988 had receded although physics had advanced a long way since 1988. In 1995 in a lecture entitled *Gödel and the end of Physics* to be found on his website at <http://www.hawking.org.uk/index.php/lectures/publiclectures/91> Professor Hawking expressed doubt whether such a theory would ever be found and said 'our search for understanding will never come to an end'.

<sup>69</sup> William Tetley, *Maritime Liens and Claims* 35.



procedure available in our courts in respect of a certain class of claims anymore than it is necessary for us to say that provisional sentence is an action against a liquid document as opposed to saying that it is a useful procedure for enforcing claims founded on a liquid document.

It is therefore submitted that in viewing the action *in rem* in South Africa, including the action as it lies against an associated ship, the correct approach is to follow the lead given by Lord Steyn in *The Indian Grace (No 2)* and to say unequivocally that the action *in rem* is a form of procedure by which the owner of a vessel is, from the inception of the action, brought before our courts in respect of certain claims. That is so whether one is dealing with an action in which the ship concerned is arrested or deemed to be arrested or one where an associated ship is arrested or deemed to be arrested. The difference between the two is that the owner is different and hence the person against whom the action is brought is different. This approach is in accordance with the fundamental principle enunciated in *The Berg*<sup>70</sup> that the action against an associated ship is an action against a different defendant and hence distinct from the action brought against the ship concerned. As Miller JA put it the action against the associated ship is ‘creative of new liabilities or obligations in owners of ships’. That recognised a reality that Lord Steyn was to articulate a dozen years later. It is submitted that it is the correct approach to the action *in rem* in South Africa.

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<sup>70</sup> *The Berg (AD)*, *op cit.* 712D; In *MV Yu Long Shan: Drybulk SA v MV Yu Long Shan* 1998 (1) SA 646 (SCA) at 654 Marais JA made the same point that the associated ship jurisdiction ‘render liable *persons* who would not have been liable in similar circumstances’. Again there is a recognition that the action lies against a person notwithstanding the form of citation.

## CHAPTER 12

### THE SOUTH AFRICAN ACTION IN REM

The conclusion that the action *in rem* is a form of procedure is only the starting point for a consideration of its nature and effect. In attempting to state the latter it is sensible to identify the key features that are said to flow from the invocation of that form of action and from there to see if a statement of principle can be derived that reflects these different facets. To some extent this is the approach adopted by Derrington and Turner<sup>1</sup> in their endeavour to describe the modern action *in rem*. They identify the characteristic incidents of the action (on the basis that these are left unaffected by the decision in *The Indian Grace (No 2)*) as being that:-

- '(1) once a claim form *in rem* has been issued, a change in ownership in the vessel will be ineffective to prevent the action proceeding against it, an effect known colloquially as the 'statutory lien'.
- (2) in the absence of statutory permission, an action *in rem* lies only against the vessel in connection with which the claim arises.
- (3) if the owners of the ship appear and defend the action (or at any rate submit to the jurisdiction of the court), the action proceeds thereafter as if it had also been commenced *in personam* with the result that if the *res* itself proves insufficient to meet the claimant's claim, the owner's other assets will be available for enforcement purposes.
- (4) conversely, if the owners do not appear, the claimant is limited to such of the realisable value of the *res* which is available once those whose claims rank in priority have been satisfied. Any balance may be recovered in a subsequent action *in personam*.
- (5) participation in *in rem* proceedings is not confined to the claimant and to the owners of the *res*; others may intervene in the proceedings in order to assert or protect their own rights or the priority accorded to them. Such participation neither requires nor brings with it any personal liability to the claimant.
- (6) a cause of action *in rem* does not merge in a judgment *in personam*.
- (7) the claimant in an action *in rem* may procure the issue of a warrant of arrest, after judgment as well as before judgment.
- (8) once arrested, the ship may be sold by the court, in which event all outstanding claims which could be brought by action *in rem* against her are transferred to the fund in court.'

This list needs both qualification and supplementation in the context of South Africa and

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<sup>1</sup>Derrington and Turner *The Law and Practice of Admiralty Matters*. 11 - 12, para. 2.07

the action *in rem* embodied in the Act, whether we are dealing with an action *in rem* against the ship concerned or an action against the associated ship. In what follows each of the points raised by the authors will be dealt with in turn in the particular context of South Africa. The point of principle will first be considered in relation to an action *in rem* against the ship concerned and then in the light of the conclusions drawn from that analysis the situation in regard to an associated ship will be considered. In contradistinction to the authors the approach adopted will proceed on the basis that the action *in rem* is a form of procedure and that it is directed at impleading the owner of the vessel subjected to arrest.

## 1 **THE FEATURES OF THE ACTION IN REM**

### (a) **The statutory lien and *The Monica S.***

The proposition that once the summons in the action *in rem* has been issued<sup>2</sup> a change in ownership of the vessel is ineffective to prevent the action proceeding or to defeat the statutory lien over the vessel even though service has not been effected, has not been tested in South Africa. This was the conclusion insofar as English law is concerned of Brandon J in *The Monica S*<sup>3</sup> although as the judgment shows there are significant passages in the authorities that support the proposition that it is only after the arrest of the vessel that this is the position. Hofmeyr<sup>4</sup> appears to accept that the decision of Brandon J is applicable in South Africa. He takes the view that once process has been issued the claimant is protected, even against a *bona fide* purchaser, if there is a change in ownership. However, he says that the claimant is only protected against the consequences of insolvency or a judicial management order once the vessel has been arrested or security furnished to prevent the arrest. His principal point is less about the applicability of *The Monica S*, which he accepts as applicable, and more about whether the views expressed therein

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<sup>2</sup> Admiralty rule 2(1)(a)

<sup>3</sup> [1967] 3 All ER 740 (QBD).

<sup>4</sup> *Admiralty Jurisdiction Law and Practice in South Africa*, 62-63.

are consistent with the finding in *The Indian Grace (No 2)* that from its commencement the action *in rem* is an action against the owner of the vessel named in the summons. The point he makes<sup>5</sup> is that, if the action is from its inception an action against the original owner of the vessel, but there is a change in ownership before the vessel is arrested, then this is contrary to the principle in *The Monica S* that upon the issue of the writ (now known in England as a claim form) a right of security is created against the vessel that is undisturbed by a change in ownership.

If the action is viewed as an action against the owner of the vessel then the effect of suing the owner is to establish the right of security against the vessel. This does not give rise to a problem if the same person is the owner at the time of arrest. The conceptual problem lies with the situation where at the time of the vessel's arrest it has a new owner. Does the action now mutate into an action against the new owner or does it remain one against the original owner and if so what are the consequences of that in terms of executing any judgment? The rule in *The Monica S* is that a purchaser, even a *bona fide* purchaser without knowledge of the claim, acquires the ship subject to the pre-existing burden arising from the issue of *in rem* proceedings against it. If the characterisation of the action as being one from its inception against the original owner of the vessel is not to alter or remove that consequence there needs to be an explanation for that result insofar as the new owner is concerned. It is possible in the case of a maritime lien and a change in ownership of the vessel before action commences to explain the position on the basis that the new owner has acquired the vessel subject to a prior charge and is nonetheless the person impleaded by the action, but the principle in *The Monica S*, if maintained, seems to mean that an action commenced against A becomes an action against B if there is a change in ownership of the vessel between the issue of process and the service thereof. Whether this is a problem in the South African context depends on whether the principle of *The Monica S* is applicable in the case of actions *in rem* in this country.

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<sup>5</sup> Nigel Teare QC '*The admiralty action in rem and the House of Lords*' [1998] LCMLQ 33 at 41 raises the same concern and asks rhetorically '... if the action in rem is in substance an action *in personam* why would [the right against the vessel] be continued?' In view of the conclusion I reach this is not a pertinent question in South Africa.

Shaw<sup>6</sup> took the view that the problems raised by *The Monica S* of a change in ownership of the vessel between the date when the summons is issued and the date of arrest of the vessel did not arise in South Africa under the Act because of the provisions of section 3(5) of the Act that the action *in rem* is instituted by the arrest of the property.<sup>7</sup> However, that view is inconsistent with the subsequent decision in *The Jute Express*,<sup>8</sup> where it was held that an action *in rem*, under the Act as it then stood, is instituted by the issue of the summons. Accordingly it is possible in South Africa for ownership of the vessel against which an action *in rem* is instituted by the issue of a summons to be transferred before the vessel is arrested.

A more significant point of construction of the Act is whether, having instituted an action *in rem* by issuing a summons, it remains permissible to arrest the vessel after a change in ownership. As a matter of construction of the relevant sections of the Act it is doubtful whether it is. The key holding in *The Jute Express* is that it is an essential requirement for an action *in rem* that the property against which the action is directed should be arrested, either actually or by way of a deemed arrest under section 3(10)(a) of the Act. Section 3(4) says that a maritime claim may be enforced by an action *in rem* in two situations. The first is where the claimant has a maritime lien over the property to be arrested, where ownership of the vessel is immaterial. The second is where the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the maritime claim. This is the important case as far as the statutory lien is concerned. Whilst the action may be instituted without an arrest having occurred the provision is clear in stating that the owner of the property to be arrested must be personally liable on the claim. If at the time of the arrest of the vessel the owner is not so liable then there is

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<sup>6</sup> *Admiralty Jurisdiction and Practice in South Africa*, 33

<sup>7</sup> This would include its deemed arrest by virtue of s3(10)(a)(i) of the Act.

<sup>8</sup> *M.V. Jute Express v Owners of the cargo lately laden on board the m.v. Jute Express* 1992 (3) SA 9 (A). It is also inconsistent with the subsequent amendment of s1(2) of the Act to provide, consistent with that judgment, that the action commences by the issue of an process for its institution irrespective of whether the process is or has been served. The action lapses if it is not served within twelve months of the issue of the process in question. s1(2)(b)(iii). *M.T. Cape Spirit: Owners of the cargo lately laden on board the m.t. Cape Spirit v m.t. Cape Spirit and Others* 1999 (4) SA 321 (SCA).

much to be said, at the level of interpretation of the section, for the proposition that the vessel may not be arrested. In other words that properly interpreted the section requires the owner of the property to be personally liable both at the time of institution of the action and at the time of the vessel's arrest. It is noteworthy that the section is couched in language of futurity ('if the owner of the property to be arrested would be liable') as opposed to present liability ('if the owner of the property to be arrested is liable'). This approach also resolves the problem of the action mutating from one against the original owner to one against the new owner. The action as instituted is against the original owner, which is also the party personally liable in respect of the claim. Once there is a change of ownership the vessel cannot be arrested and the action cannot continue because the essential requisite of arrest becomes unobtainable.

Apart from that textual consideration, which at the very least shows that this is an open question in South African law, it is submitted that there are other reasons why it cannot be accepted that *The Monica S* is good law in South Africa. There is no difficulty with the proposition that once the summons has been served and the vessel arrested the claimant obtains a security interest in the vessel that survives a subsequent change in ownership. That accords with the basic principles of the Roman Dutch law - which it hardly needs noting is a civilian system - that gives effect to the maxim *qui prior est tempore potior est jure*<sup>9</sup> and holds real rights in property to have priority over personal rights. Where summons has been served and the vessel arrested that is notice to the world of the claimant's prior right *in rem* against the vessel and a subsequent purchaser, whose claim to delivery of the property is purely a personal right against the previous owner, would necessarily take the property subject to the accrued real right.<sup>10</sup> Whilst there is no difficulty with the notion that the arrest of the vessel named as the defendant in an action *in rem* creates a security interest vesting in the claimant and exercisable notwithstanding a change in ownership of the vessel subsequent to its arrest, the concept of a security interest giving a real right arising without notice to the party affected thereby or to the

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<sup>9</sup>That which is prior in time is prior in law.

world by some public act is unknown to South African law. Until the vessel has been arrested there is no public act that would proclaim the existence of the right of security. In South African law the entitlement to obtain such security would be characterised as a personal right against the owner of the vessel in the same way as the right of a creditor who has taken a cession *in securitatem debiti* is a personal right that remains inchoate and ineffective as security until notice is given to the debtors of the existence of the cession. A pledge of movables or a notarial bond over movables is likewise ineffective until the necessary legal steps have been taken to perfect the security by way of an order of court, service of that order and attachment of the goods subject to the pledge or notarial bond.<sup>11</sup> Why should the position be different in admiralty where a summons may be issued and lie fallow, not served, for twelve months? That is a lengthy period during which it is readily imaginable that a change of ownership may occur. The new owner is likely to have no connection to the claim that gave rise to the right to proceed *in rem* where that claim arises from the personal liability of the previous owner of the vessel.

This brings us back to the discussion of the constitutionality of interpreting a provision of the Act in a way that can bring about the situation where the owner of the arrested ship finds that the ship is liable for a claim in respect of which the current owner has no connection. We are not here concerned with the situation of a maritime lien, because the existence of such a privileged claim is an internationally accepted feature of maritime commerce and serves an invaluable purpose in providing a means of recovery and a preference in respect of a limited class of claims. That feature is so well-known and accepted as a potential hazard of being a shipowner that it should survive constitutional scrutiny notwithstanding the fact that it may result in the owner of a ship discovering that the ship is subject to security rights vested in creditors even though the owner itself has no connection with the underlying claims that lead to the creation of those rights. There are a few such situations known to our law such as the landlord's tacit hypothec, or the statutory preference given to a municipality in respect of its charges and the maritime lien

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<sup>10</sup> The right so obtained is similar to the *pignus judiciale* obtained by way of attachment of property in execution. See *Dream Supreme Properties 11CC v Nedcor Bank Ltd and others* 2007 (4) SA 380 (SCA), para [14].

<sup>11</sup> *Development Bank of Southern Africa Limited v Van Rensburg and Others NNO* 2002 (5) SA 425 (SCA);

falls in a similar category of being well-established and therefore a risk against which the purchaser of a ship can guard when purchasing the vessel. However vesting a security interest in the vessel as a result of nothing more than the issue of a summons *in rem* stands on a different footing entirely. The range of maritime claims that can permit of such an action is broad and open-ended.<sup>12</sup> The issue of the summons is not a matter of public knowledge nor is there any reasonable way to ascertain whether such a summons has been issued. The capacity to safeguard against that eventuality is limited. Lastly to impose a security interest in those circumstances is inconsistent with the principle that people should only be liable for their own debts unless they have consented to accept liability for the debts of others. For all those reasons it is submitted that it the principle in *The Monica S* should not be applied in an action *in rem* in South Africa against the ship concerned.

The position in regard to an associated ship is an *a fortiori* case. If the submissions in chapter 6 are correct in regard to the date upon which the action commences for the purposes of an associated ship arrest (as opposed to other relevant purposes), then it must follow that the principle in *The Monica S* does not apply to an associated ship arrest to commence an action *in rem* against the associated ship. The reason is simply that in the case of an associated ship one is already dealing with a situation where the vessel being arrested is not owned by the owner of the ship concerned. What is crucial in that situation is the time when the association must exist, a matter determined by the question of when the action is commenced. It was submitted in chapter 6, in part for the same constitutional reasons adverted to above, that the date of commencement of the action is the date of service, which goes hand in hand with arrest or the date of furnishing security, which obviates the need for an arrest. If that is correct there is no room for the operation of the principle in *The Monica S* in relation to an associated ship arrest commencing an action *in rem*. It is submitted that the constitutional reasons for so interpreting the question of commencement of the action for the purposes of determining association are so compelling that

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*Contract Forwarding (Pty) Limited v Chesterfin (Pty) Limited and Others* 2003 (2) SA 253 (SCA), paras. [4] to [6].

<sup>12</sup> See sub-para (ee) of the definition of maritime claim in s1(1) of the Act. The fact that the range of maritime claims recognised in South Africa is wider than in many other jurisdictions has already been noted.



the other possibility cannot be accepted. If that is so then it provides a further reason for holding that *The Monica S* does not apply in South Africa even in relation to the arrest of the ship concerned. It is highly desirable that so far as possible the action *in rem* against the associated ship should have the same characteristics as the conventional action *in rem* or the action *in rem* against property other than a ship. This can be achieved by holding that in South Africa the statutory lien arising in respect of maritime claims, other than maritime liens, only arises on the arrest or deemed arrest of the vessel or property in question and not on the mere issue of a summons. Such a conclusion does, however, immediately serve to distinguish the action *in rem* in South Africa from its English counterpart. It also means that this at least poses no obstacle to the acceptance in South Africa of Lord Steyn's view in *The Indian Grace (No 2)*. An action *in rem* in South Africa, whether against the ship concerned or an associated ship, can be viewed as one that impleads the owner of the vessel or property arrested.

(b) **In the absence of statutory authority the action lies only against the ship concerned.**

This statement is presumably intended to enshrine, or at least reflect, the decision in *The Beldis*.<sup>13</sup> Whilst accurate insofar as it goes however it does not seem to add anything to our understanding of the nature of the action *in rem*. Apart from anything else the fact that it has to be qualified by the words 'in the absence of statutory authority' reveals its weakness, because it illustrates what is well-known, namely that in many countries around the world<sup>14</sup> the arrest of a vessel other than the ship concerned is something that is and has, since the Arrest Convention, been permissible. The fact that it is not a widespread occurrence is due to the fact that very few shipowners choose to place their vessels in common ownership, preferring to make use of one-ship companies instead. Thus the sister ship arrest provisions of the Arrest Convention<sup>15</sup> are to a large measure a dead letter. In South Africa however, as a result of the associated ship the exception is very important because of the vibrant existence of the associated ship and the capacity to commence an action *in rem* by arresting an associated ship. Having said that however

<sup>13</sup> *Beldis*, *The* 1936 P 51; 18 Asp MLC 598 (CA); 53 Ll. L. Rep. 255

<sup>14</sup> But not the United States of America.

<sup>15</sup> And corresponding provisions such as the surrogate ship arrest in Australia.

its significance is not that it affects the basic nature of the action *in rem* but that the invocation of the action by way of the arrest of an associated ship may have different consequences from those that normally flow from such an action.

Of more significance is perhaps that the existence of sister ship arrests in other jurisdictions and the associated ship arrest in South Africa highlights the fact that the jurisdiction to proceed *in rem* in this country and in others that also recognise the action *in rem* is a jurisdiction the nature of which is determined by statute in our case the Act rather than by any historical inheritance from English admiralty law. The extent to which that historical legacy is relevant will depend on the construction of the Act when viewed in the light of our own legal principles. The differences among different jurisdictions also demonstrate that there is no inherent logic in the scope or extent of the *in rem* jurisdiction that dictates that any particular limit or extension of the jurisdiction should have application. This is further illustrated by the fact that in South Africa an action *in rem* can be brought not only against a ship but also against the whole or part of its equipment, furniture, stores or bunkers; the whole or part of the cargo; freight; any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water other than in the container or against a fund in court. The extension of the scope of the action *in rem* is therefore extensive but it is unclear in what way that changes the essential nature of the action. It remains a procedure commenced by the arrest of property and capable of being pursued by the claimant without intervention by the owner of the property with the benefit of a security interest once the property has been arrested.

The most important aspect of this is that it shows that the action *in rem* does not have any inherent content beyond that determined by the legislature in each country, at least insofar as the extent of its application is concerned. In England it originally related only to a limited range of claims that had survived the process of prohibition and were associated with the notion of a lien over the vessel. That changed with the extension of the ability to bring claims by way of proceedings *in rem* by the 1840 and 1861 Admiralty Court Acts. It has been further altered by the extension of the list of permissible maritime claims and the introduction of the

sister ship arrest after the United Kingdom's accession to the Arrest Convention and the passing of the Administration of Justice Act, 1956 and the Supreme Court Act, 1981. The entitlement to proceed *in rem* and the identification of the property against which such a claim may be brought are in turn inextricably linked to the class of claims in respect of which such a proceeding is permissible. Whilst in English practice it remains largely true (particularly with the arrest of a sister ship being relatively academic) that it is the ship concerned that will be the principal target of the action *in rem* the position may be different in other jurisdictions where the action *in rem* is a feature of admiralty practice depending upon the statutory regime in force in that jurisdiction. South Africa is such a jurisdiction.

All this leads one to wonder on what basis the proposition that the action lies against the ship concerned, save to the extent that statutory authority otherwise provides, is helpful in identifying the content or nature of the action itself. The fact of the matter is that the availability of the action is inevitably something that is inherently susceptible to legislative interference. In most jurisdictions, which have English admiralty law and practice as the source of their own jurisdiction, the scope of the action is delineated by legislation that links the action with a list of claims and the identification of the property that may be the subject of arrest as a basis for commencement of the action. How then does it help to state that the action will ordinarily arise in relation to the ship concerned in the absence of statutory authority? Indeed it is submitted with respect that the statement itself is misconceived in that it presupposes an action *in rem* against the ship concerned divorced from the legislation governing such procedure, which is simply not possible. In other words the action against the ship concerned is as much derived from statutory authority as is the action against the sister ship in England, the surrogate ship in Australia and the associated ship in South Africa.

It is submitted that the proper statement, although not particularly illuminating, is that the action is available in all those circumstances where the legislature has made the action available to a particular claimant. That is so whether the claim is one in respect of which the action was 'traditionally' available or whether it is a novel claim to which the availability of the

action has been extended. In all cases the legislature has determined that the claim in question is one that can be pursued by these means and thereby conferred on such claims the advantages, including the advantages in respect of security of the claim, that accompany the right to bring an action in this way. This is true for South Africa and it is submitted for other jurisdictions having similar roots insofar as the action *in rem* is concerned that have now enshrined their admiralty jurisdiction in statutes. Whilst history inevitably plays a role in the interpretation of those statutes at the end of the day it is the terms of the statute itself that are decisive. So in South Africa the legislature originally provided that a certain range of claims would be cognisable before the court exercising its admiralty jurisdiction and that those claims would in general be capable of being pursued by way of an action *in rem* against an associated ship. In 1992 it extended the list of claims that could be entertained by the court exercising admiralty jurisdiction and in various respects extended the scope of the associated ship arrest. It drew no distinction between those claims that historically had fallen within the admiralty jurisdiction of our courts under the predecessor to the Act and those that were novel. All are treated the same (save in respect of the law applicable thereto) and by and large all enjoy the same advantages as a result of being capable of being pursued in this way. There seems to be little point then, at least in a South African context<sup>16</sup>, in seeking to postulate a general rule that is historically based but is neither accurate in its description of present reality nor helpful in advancing our understanding of the action *in rem* as it exists and operates at present. It is more realistic to accept that the action has become a creature of legislation extending to such claims as the legislature chooses and pursuable in the manner and against such property as the legislature has determined. That will often be the ship in respect of which the claim arose, but that is not because of the inherent nature of the action *in rem* but because in practical terms it is likely to be most convenient, in respect of the majority of claims, to pursue the claim on that basis. As far as the nature of the action *in rem* is concerned it is suggested that the identification of the claims in respect of which the Act confers the right to proceed *in rem*, either against the ship concerned, or against an associated ship or against other property, does not affect the nature of the action itself.

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<sup>16</sup> Whether the comments made here are applicable elsewhere will depend upon their own legislation and the jurisprudence developed by their courts.

Accordingly, in the South African context this suggested property of the action *in rem* can safely be jettisoned.

(c) **Appearance or submission to the jurisdiction by the owners of the ship means that the action proceeds as if it had also been commenced in personam.**

This is the rule in *The Dictator*<sup>17</sup> confirmed in a number of subsequent cases.<sup>18</sup> In *The August 8*<sup>19</sup> Lord Brandon of Oakbrook said:

“[b]y the law of England, once a defendant in an Admiralty action *in rem* has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him not only as an action *in rem* but also as an action *in personam* ...’.

It is by no means clear that if the owner is not personally liable in respect of the claim, as for example, where the claim is based on a maritime lien and the vessel has changed hands in the meantime, that this means that the owner incurs personal liability for the entire claim as opposed to liability up to the value of the vessel. When the rule was first enunciated in *The Dictator* Jeune J was careful to say that he was dealing with a situation where a personal action would have lain against the owner of the vessel.<sup>20</sup> The adoption of the rule in later cases also appears to have been in situations where the personal liability of the owner was not in issue.<sup>21</sup> The arguments under consideration were to the effect that in an action *in rem* judgment could not be given and executed upon for more than the value of the ship, not that an owner who defended

<sup>17</sup> [1892] P 304.

<sup>18</sup> *The Gemma* [1892] P 285; *The Dupleix* [1912] P8; *The August 8* [1983] 2 AC 450 (PC) 456.

<sup>19</sup> [1983] 2 AC 450 (PC) at 456.

<sup>20</sup> At 310, 313, 315 and 319. At 310 he posed the question under consideration in the case as being: ‘It is necessary to consider whether, in an action *in rem*, when a personal action would lie against the owners, judgment can be enforced for more than the value of the res.’ (My emphasis.)

<sup>21</sup> In *The Gemma*, *supra*, there is a reference at 29 to ‘persons ... [who] think fit to appear and fight out their liability’. In *The Dupleix*, *supra*, 15 Evans P referred to ‘an appearance not merely to secure release of property arrested, but also for the purpose of attempting to obtain a judgment freeing defendants from all liability for a collision.’ In *The Jupiter* [1924] P 236 at 243 Scrutton LJ expressed the firm view that the object of an action *in rem* is ‘to make the man appear so that he might be a personal defendant’. None of these cases seem to go so far as to hold a person not otherwise personally liable, liable merely by virtue of having entered an appearance to defend.

such an action assumed a liability that would otherwise not attach to them. In its broadest expression however, such as the passage quoted from *The August 8, supra*, it may be construed as holding that the effect of an owner entering an appearance to defend is to render the owner liable *in personam* for the debt that is the subject of the action, irrespective of whether they are personally liable, and that is certainly an understanding that has influenced debate in South Africa over the rule and its operation in this country. For present purposes it will be accepted that this is the effect of the rule without engaging in a lengthy analysis of the English cases to assess whether that is indeed the case. That task is best left to someone else.

Shaw criticised the rule in its broader sense, when he wrote:

The entry of appearance is a submission to the jurisdiction not an acceptance of liability.”<sup>22</sup>

The matter is dealt with in South Africa under Admiralty Rule 8(3), (formerly rule 6(3)), which provides that:

‘A person giving notice of intention to defend an action *in rem* shall not merely by reason thereof incur any liability and shall, in particular, not become liable *in personam*, save as to costs, merely by reason of having given such notice and having defended the action *in rem*.’

Our courts have not considered in any detail the precise effect of this rule. On the few occasions on which it has been the subject of mention the assumptions by the parties and the judges leaves the impression that its purpose is to reverse in its entirety the English rule referred to above so that no question arises of personal liability attaching in consequence of an action *in rem*.<sup>23</sup> However, it is by no means clear that this is so and there has been no attempt to examine the rule in any depth. An initial comment is that the background to the rule must lie not only in the

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<sup>22</sup> D J Shaw, *Admiralty Jurisdiction and Practice in South Africa*, 31.

<sup>23</sup> *Bouyges Offshore and another v Owner of the MT Tigr and another* 1995 (4) SA 49 (C) at 67D-J; *SA Boatyard CC (t/a Hout Bay Boatyard) v The Lady Rose (formerly known as the Shiza)* 1991 (3) SA 711 (C) at 715-716; *MT ‘Argun’ v Master and Crew of the MT ‘Argun’ claiming under case number AC 126/99 and others* 2004 (1) SA 1 (SCA), para [26]. This is how it is understood by Derrington & Turner, *op cit*, 12, fn 7.

decision in *The Dictator* and the cases that have followed it, but also in the principle recognised in admiralty that, in proceedings *in rem*, parties other than the owner of the vessel arrested may intervene to defend their interest in the property arrested and if they do so they do not incur any personal liability in respect of the claim, but only a liability for costs. In addition the ability to commence an action *in rem* by way of the arrest of an associated ship adds a different dimension to the issue. The reference to “a person” in the rule clearly includes an owner that enters appearance to defend in order to protect its ownership of the vessel; a charterer or mortgagee, which enters appearance in order to protect its particular interest in the vessel and the owner of an associated ship, which enters appearance to defend in order to defend its interest in that ship. Those are three different scenarios yet the same rule applies to all three. In each instance its impact, on the basis of the assumption referred to above, will differ as emerges from what follows.

Where one is dealing with the ship concerned and its owner the effect, so it has been said, is to reverse the rule in *The Dictator*, even where the owner is in any event personally liable for the claim, so that any such personal liability is not established in the proceedings and any judgment does not operate *in personam*. Where one is dealing with a mortgagee or charterer or other third party, apart from the owner, the effect on the other hand is to maintain the traditional rule that such persons may intervene and defend the proceedings without incurring any personal liability, save in respect of costs. There has been no consideration of the impact of rule 8(3) on the owner of an associated ship. Is the effect that whilst their ship may be arrested they are not personally liable for the entire debt if they defend the action? That is not clear and it may be difficult to reconcile with judicial statements that the effect of the action against the associated ship is to create a new liability on the part of the owner of that vessel. In effect the meaning of the rule varies depending upon the circumstances. That is an unusual situation and suggests that the original assumption may not be well-founded. A closer examination of the rule is justified.

A good starting point is the language of the rule itself. It says that a person will not

“merely by reason of having given such notice and having defended the action” incur any liability, and in particular, any liability *in personam*. The use of the word ‘merely’ is significant. It indicates that the operation of the rule is narrowly confined to the consequences of entering an appearance to defend an action *in rem*. Its plain meaning is that the entry of appearance on its own does not have the effect of attaching any liability, other than a liability for costs, to the person entering an appearance. That person does not thereby become liable *in personam* on the claim. However, it by no means follows from this that an action *in rem* cannot be the vehicle for determining the personal liability of the owner of the vessel, nor that a judgment in such an action cannot serve to found execution against the property of the owner including the ship itself. In other words there is room to think that the extent to which Rule 8(3) circumscribes the rule in *The Dictator* may be limited.

Rule 8(3) does not say that if the person is already liable for the claim that such liability will be affected by the entry of appearance to defend. It says that a liability *in personam* does not arise merely by entering appearance to defend. That seems to leave open the possibility that the pre-existing personal liability, in conjunction with the appearance to defend and the nature of the action *in rem* itself, may result in liability *in personam*. It also leaves open the possibility – simply as a matter of language - that other circumstances, apart from the entry of appearance to defend, may result in a personal liability attaching to a person who defends a claim. That raises the possibility that a person who provides security for the claim and submits to the jurisdiction of the court, and then delivers notice of intention to defend, will be liable *in personam* whether or not they are personally liable on the claim. A further possibility is that the entry of appearance in conjunction with something else will give rise to such liability, but then it does not spell out what that something else will be. To say that one does not incur liability “merely by reason of” giving notice of intention to defend suggests that one can incur such liability, either for some other reason entirely or by reason of giving notice to defend in conjunction with something



else.<sup>24</sup>

Let us start by considering the case where the owner of the ship concerned is personally liable for the claim so that the existence of such liability precedes the arrest of the vessel and giving notice of intention to defend the action. In terms of section 3(4)(b) of the Act an action *in rem* can be instituted if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned. There is an important reason for making the action *in rem* available in these circumstances, namely that otherwise the property in question could simply be attached *ad fundandam et confirmandam jurisdictionem* in an action against the owner. In other words these are alternative procedural approaches to pursuing a single claim before a single court. This is not the position in England and would not have been the position in South Africa either under the Colonial Courts of Admiralty Act, which did not recognise such an attachment as a basis for the commencement of proceedings, nor under the common law, which imposed restrictions on the ability to obtain such an attachment in proceedings between *peregrini* and did not know the action *in rem*. (It must be remembered that the parochial court and the colonial court of admiralty were, notionally at least, separate courts.) That situation has now been altered by the Act, which confers a choice upon the claimant whether to proceed *in rem* or *in personam*. It would be surprising if, having done that in the Act, the rules then created a situation where the choice between the two forms of proceeding can create problems insofar as the pre-existent personal liability of the owner is concerned.<sup>25</sup> The wording of rule 8(3) does not convey any intention to exclude or disregard the pre-existing

<sup>24</sup> See the similar reasoning of Holmes JA and Miller JA in *Cornellisen NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) at 174A and 179C-D respectively. That case dealt with a provision referring to “only by virtue of”. That seems to be to the same effect as the words “merely by reason of” in rule 8(3).

<sup>25</sup> There is already a problem in that where a vessel is attached *ad fundandam et confirmandam jurisdictionem* the owner can only secure its release by putting up security for the entire claim. *Yorigami Maritime Construction Company Limited v Nissho-Iwai Co Limited* 1977 (4) SA 682 (C) at 697E-698G. Admiralty Rule 4(7)(a)(ii) provides that a person can secure the release of their vessel by furnishing security ‘on the giving of security in a sum representing the value of the property or the amount of the claims of the person who has caused the arrest to be effected.’ Whilst the rule does not use the expression ‘whichever is the less’ conventional interpretation suggests that this is what is intended because otherwise the reference to the value of the vessel would simply be omitted as redundant. The result is that the amount of security that can be obtained by proceeding against a particular vessel will depend upon which form of procedure is adopted. This does not appear to be a rational result and may be subject to constitutional challenge.

liability of an owner whose vessel is arrested in an action *in rem*. It simply says that a particular procedural step will not create a liability for the party taking that step. To construe it as precluding the enforcement of a liability that already exists or is constituted by other means seems to go beyond its natural purpose.

If rule 8(3) is taken as revoking in its entirety for South African purposes the rule in *The Dictator* and the cases following it in its entirety, the effect is startling at least insofar as the pre-existing liability of the owner is concerned. We continue with the situation where a vessel is arrested in proceedings *in rem* in respect of a claim for which its owner is personally liable. The owner unsuccessfully defends the proceedings and a judgment is entered. The vessel is sold but does not realise sufficient to discharge the judgment debt in full, perhaps because creditors with claims ranking higher than that of the successful claimant participate in the distribution of the proceeds. In terms of *The Dictator* the judgment creditor would be entitled to attach the vessel or attach other property of the owner in an endeavour to obtain satisfaction of the claim. The judgment could be taken to another jurisdiction and enforced as a judgment without having to prove the claim afresh. If that is no longer the position as a result of rule 8(3) the creditor must commence fresh proceedings on the same cause of action against the owner, either in South Africa or elsewhere, as opposed to having the advantage of a judgment and enforcing it. Other fundamental questions arise if that is the position. For example, if the owner is not taken as being a party to the proceedings and it does not determine their liability *in personam*, then it would seem that the judgment obtained cannot be used either to found a contention that the question of liability is *res judicata* or to raise an issue estoppel against the recalcitrant debtor. In other words the entire action would potentially be subject to being litigated afresh, either in South Africa if other property can be attached or in another jurisdiction. That would be a wholly unsatisfactory situation and indeed would be the very unsatisfactory situation that at the end of his judgment in *The Dictator*, Jeune J expressed relief at not having to hold existed in England. The problem could presumably be circumvented by the expedient of both arresting the vessel *in rem* and attaching it *ad fundandam et confirmandam jurisdictionem* at the same time so that the action could proceed as a hybrid action, both *in rem* and *in personam*.

at the same time. However, that seems to be an unnecessary and utterly wasteful exercise in litigation gymnastics, when the whole basis for the litigation is that the owner is personally liable and the owner has resisted that conclusion and lost.

This takes one to the underlying reason for the rule in *The Dictator* namely the proposition that by entering appearance to defend the owner of the vessel who is personally liable submits to the jurisdiction of the court. That is important in England where the question of jurisdiction is procedural and accordingly the ability to serve the defendant is crucial to the court exercising jurisdiction over that person. One of the perceived advantages of the action *in rem* is that it is possible to pursue the claim and have security for it without the need to find and serve directly the person personally liable in respect of the claim. Where there is a submission to the jurisdiction these problems are overcome. In South Africa, as explained earlier when the origins of the attachment to found jurisdiction were explored, the underlying notion of the attachment was that if the person's goods were or their person was attached this would serve as a spur to them accepting the jurisdiction of the court for the purposes of the litigation. In other words the attachment of property was directed in part at least at procuring the owner's submission to the jurisdiction of the court and thereby rendering the judgment of the court effective, not only against property attached but against the defendant personally, because a judgment based on the voluntary submission of the defendant is internationally recognised and enforceable. This proposition underpins the principle that a prior voluntary submission to the jurisdiction of the court excludes the entitlement to and the need for an attachment.<sup>26</sup>

It is worth asking whether in accordance with conventional principles relating to submission to the jurisdiction of a court the conduct of the owner of a vessel in giving notice of intention to defend an action *in rem* would constitute a submission to the jurisdiction of the court and, if not, whether the conduct of a defence on the merits, perhaps in conjunction with other conduct such as the furnishing of security in order to have the vessel released, constitutes a submission to jurisdiction. The well-established test in this regard is whether the party in

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<sup>26</sup> *Jamieson v Sabingo* 2002 (4) SA 49 (SCA), paras [24] to [26].

question has unequivocally indicated by words or conduct that they accept the jurisdiction of the court to decide the dispute or do not timeously object thereto, this will be taken to be a submission.<sup>27</sup> As it was put by van Heerden J:

‘Submission to the jurisdiction of a court is a wide concept and may be expressed in words or come about by agreement between the parties. *Voet* 2.1.18. It may arise through unilateral conduct following upon citation before a court which would ordinarily not be competent to give judgment against that particular defendant. *Voet* 2.1.20. Thus where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not objecting to the [jurisdiction] of that court, he may, in cases such as actions sounding in money, confer jurisdiction on that court. *Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa* 3rd ed at 30; *Pollak The South African Law of Jurisdiction* at 84 et seq.’<sup>28</sup>

A person who defends litigation, without objecting to the jurisdiction of the court up to the stage of *litis contestatio*, will be held to have submitted themselves to the jurisdiction.<sup>29</sup> It is permissible to enter an appearance to defend, without that being construed as a submission to the jurisdiction, provided that the defendant thereafter challenges the jurisdiction of the court. It is only where the matter proceeds to *litis contestatio* without a challenge to the court’s jurisdiction that the actions of the defendant in defending the case are taken to constitute a submission to the court’s jurisdiction. Thus there is authority that merely furnishing an address for service (which is required by Admiralty Rule 4(6) when a person gives security under section 3(10) to prevent an arrest) does not constitute a submission to the jurisdiction because our rules provide no basis for giving a qualified notice of appearance to defend.<sup>30</sup>

Applying these principles in the case of an action *in rem* where the owner is personally liable the entry of appearance would not as such and without more constitute a submission to the jurisdiction. However, if the case was thereafter defended, without any challenge to the

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<sup>27</sup> *Du Preez v Philip-King* 1963 (1) SA 801 (W) at 803C-804H.

<sup>28</sup> *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D) at 333E – G quoted with approval in *Purser v Sales; Purser and another v Sales and another* 2001 (3) SA 445 (SCA), para [13].

<sup>29</sup> *Lubbe v Bosman* 1948 (3) SA 909 (O) at 914; *William Spilhaus & Co (MB)(Pty) Ltd v Marx* 1963 (4) SA 994 (C) at 996D-H

<sup>30</sup> *Malcolmess and Co. Ltd v Allkin & Co. Ltd.* 1914 CPD 519.

jurisdiction being raised and without an application for a stay or for the court to decline jurisdiction, on ordinary principles that would amount to a submission to the jurisdiction. The provision of security alone would probably not amount to a submission as it would be seen as a matter of commercial necessity rather than a voluntary submission and in most cases the terms of the security reserve the right to challenge the arrest or deemed arrest. A failure to do so, however, in conjunction with a defence of the action would ordinarily constitute a submission to the jurisdiction. Why should this not be the position in an action *in rem* with an owner who is personally liable? In that case the ship could have been attached *ad fundandam et confirmandam jurisdictionem* to found and confirm jurisdiction over the owner. Why should the choice of an action *in rem*, instead of an action *in personam*, determine whether the court has personal jurisdiction over the owner and whether its judgment binds the owner? And why should a rule of procedure be taken to alter or reverse such a well-established and practical legal rule? That seems to be a very far-reaching construction.

When the owner chooses to enter the lists and defend the claim, which involves defending its personal liability for that claim, every reason of convenience suggests that to treat that as submitting to the jurisdiction of the court for the purposes of the adjudication of that claim is appropriate. It is submitted that there is nothing in the language of the rule to suggest that the principles of submission do not apply to an owner defending an action *in rem*. All that the rule says is that the mere fact of entering an appearance to defend does not create a liability and particularly a liability *in personam*. Assuming that this broad language extends to the creation of a liability in the sense of being liable to be regarded as having submitted to the jurisdiction of our courts, it goes no further than the existing approach of our courts to questions of submission to the jurisdiction. Accordingly the rule does not appear to go further than and indeed reflects existing practice insofar as entering an appearance to defend is concerned.<sup>31</sup> This is a necessary provision in the light of the fact that the Act allows a party to enter an appearance to defend the proceedings and to raise by way of a declinatory plea the provisions of section 7(1) of the Act

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<sup>31</sup> Apparently that was also the previous general position in England (D Jackson, *Enforcement of Maritime Claims*, 2<sup>nd</sup> Ed, 177) but that position may have changed as a result of the changes in civil procedure in English courts in recent years (D Jackson, *Enforcement of Maritime Claims*, 4th Ed, paras 9.58 to 9.60.)

the defence of *forum non conveniens* or to seek a stay of the proceedings under section 7(2) pursuant to an arbitration clause or an exclusive jurisdiction clause. There does not appear to be a good reason for taking it any further than that.

It may be objected that the actions of the owner in defending an action *in rem* after entering an appearance to defend and after reaching the stage of *litis contestatio* cannot amount to a submission to the jurisdiction *in personam*, because the proceedings being *in rem* they do not lie against the owner but only against the vessel and hence the owner's actions cannot amount to a submission in its personal capacity. However, that contention forces us to confront the nature of the action *in rem* and the question whether such an action is, whatever its outward form, always from the outset an action against the owner of the vessel that is the subject of the action. If it is correct for South Africa, as Lord Steyn has held is the position in England, and as I have suggested that the action *in rem* is merely a procedure by which the owner of a vessel is brought before the court, then there can be no objection to treating the owner's conduct in regard to those proceedings as a submission *in personam* to the jurisdiction of the court.

One further example illustrates the problems inherent in construing rule 8(3) as meaning that once an action *in rem* has been instituted it is always treated as not in any way determining the liability of the owner of the defendant vessel *in personam*. It is permissible under Admiralty Rule 10 for any person who has given notice of intention to defend to bring a claim in reconvention, thus embodying in the rules the judgment in *The Lady Rose*.<sup>32</sup> Take the case where the owner takes advantage of this to bring such a claim, for example, a claim under section 5(4) of the Act. It transpires that in doing so it was unduly optimistic in regard to its ability to resist the plaintiff's claim and that claim, based upon the owner's personal liability succeeds and the claim in reconvention is dismissed. There can be no question about the fact that the owner was before the court and submitted to its jurisdiction. Van Heerden J said in the case already mentioned,<sup>33</sup> where the facts were the converse of those described:

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<sup>32</sup> *SA Boatyard CC (t/a Hout Bay Boatyard) v The Lady Rose (formerly known as the Shiza)* 1991 (3) SA 711 (C).

<sup>33</sup> *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D) at 334A.

‘Anyone who invokes the jurisdiction of this Court for relief under the Act must be taken - and can hardly be heard to contend otherwise - to have submitted to that jurisdiction ...’

For the court then to say to the successful plaintiff that the judgment in its favour was operative only against the named vessel or the security given to procure its release and not against the owner who had unsuccessfully resisted the claim (and counter-claimed thereby invoked the jurisdiction of the court in an endeavour both to have the claim rejected and to procure an award in its favour) is, to say the least, a very unattractive proposition.

It is submitted that the proper interpretation of the rule is this. It embodies the traditional approach of our courts that giving notice of intention to defend does not without more constitute a submission to the jurisdiction of the court. It therefore narrows the potential<sup>34</sup> range of operation of the rule in *The Dictator* by saying that merely giving notice of intention to defend does not attract liability *in personam* beyond a liability for costs. If my reservation regarding the true scope of that rule is correct and the case is not to be construed as imposing any liability on an owner, not otherwise personally liable in respect of a claim, then rule 8(3) is consistent with the application of the principle laid down in *The Dictator*. In South Africa it is submitted that if the owner is personally liable on the claim and enters appearance to defend rule 8(3) provides no reason not to apply the principles of *The Dictator*, especially if Lord Steyn’s approach in *The Indian Grace (No 2)*, is a correct reflection of the nature of the action *in rem* as fundamentally a procedural means for impleading the owner of the vessel. Indeed the principles in *The Dictator* and those in *The Indian Grace (No 2)* become mutually reinforcing. Equally if the owner submits to the jurisdiction of the South African court in some other way as for example by way of an express submission in furnishing security to prevent an arrest under section 3(10) of the Act<sup>35</sup> or by furnishing security and then defending the action through to the stage of trial and judgment it is submitted that there is nothing in the language of rule 8(3) to indicate that the

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<sup>34</sup> I have already drawn attention to the fact that this may be an unduly broad understanding of the decision in that case.

<sup>35</sup> As I am informed by a senior attorney with many years of experience with such matters is the common practice. Others equally experienced tell me that this is not necessarily so.

principle in *The Dictator* should not apply, provided the owner is personally liable on the claim.

Why then have our courts, when considering the rule given the impression of adopting a different view and what is the binding force of those expressions of view? One starts with the case of *The Tigr*.<sup>36</sup> It was a case in which confirmation of an attachment *ad fundandam et confirmandam jurisdictionem* was sought. That was opposed on the basis of a contention that the owners of the tug had already submitted to the jurisdiction of the court. That contention was founded on the fact that the *MT Tigr* had already been arrested in an action *in rem* and the owner of the tug had given notice of intention to defend that action. It was first contended that Rule 6(3) did not apply because the owner was in any event liable in the action *in rem* because its property stood to be sold in satisfaction of the claim. That contention was rejected on the basis that the liability of the owner was limited to the value of the *res*. The second contention was that if the rule applied it was invalid because it purported to reverse the substantive law in regard to the liability of the owner of a vessel arrested in an action *in rem* and was not purely procedural. This was rejected on the basis that in English law the nature of the action is procedural. The position was said<sup>37</sup> to be the following:

‘The liability of the owner in the present case is in no way affected by the provisions of the Rule. If judgment were to be given in the action *in rem* it would only be because the Court was of the view that first respondent was liable. If applicant were not to obtain satisfaction from the proceeds of the *res* it could sue first respondent *in personam* for the balance. All that the Rule does is to provide the manner in which first respondent's liability can be procedurally enforced. In this regard it must be remembered that the action *in rem* is regarded as a procedural device and that the procedural theory of the action *in rem* is the theory which has prevailed in English admiralty law: see, for example, *The MV Andrico Unity* (supra at 353D). On this basis Rule 6(3) is concerned with a matter of procedure, that is to say the effect of an entry of appearance in an action *in rem*, and is accordingly not *ultra vires*

It follows from what I have said that Rule 6(3) applies to an owner who enters an appearance in an action *in rem*. By our procedure, as set forth in the Rule, such an owner is not regarded as having submitted to the *in personam* jurisdiction of the Court.’

<sup>36</sup> *Bouyges Offshore and another v Owner of the MT Tigr and another* 1995 (4) SA 49 (C) at 67D-J.

<sup>37</sup> At 68G-H.



There are some difficulties that flow from this statement, such as the proposition that all that the rule does is to provide the manner in which the owner's liability is to be procedurally enforced. It is unclear what this means as the rule does not deal with that topic. However, it is unnecessary to try and resolve this for present purposes. The judgment does not reject the principle determined in *The Dictator* as explained above and is consistent with the notion that the action *in rem* is procedural, although it is not clear whether the judgment on this point is dealing with the action as embodied in the Act or with the position under English law. Be that as it may it is not inconsistent with the construction I have given to Rule 8 (3). The final statement that entry of appearance does not amount to a submission to the jurisdiction is correct provided it is understood as applying to an entry of appearance standing on its own.

The second case in which rule 8(3) was considered is *The Lady Rose*.<sup>38</sup> That involved the question whether the owner of a vessel proceeded against *in rem* could bring a counterclaim. It was argued that as the action lay only against the vessel; that the rule reversed the principle in *The Dictator* so that if the owner entered appearance to defend it was not the defendant under the then wording of Admiralty Rule 8,<sup>39</sup> and accordingly the owner was not entitled to bring a counterclaim. The court (Scott J) rejected this contention in the following terms:

The effect of the Rule would seem to be to re-establish the position which prevailed in England prior to *The Dictator* (cf *Thomas Maritime Liens* para 92) and the Rule is probably the result of criticism levelled at the extension of the owner's liability which has occurred since the last decade of the previous century (cf *Jackson Enforcement of Maritime Claims* at 59; *Shaw (op cit* at 31))<sup>40</sup>. It does not follow, however, that merely because the owner defending an action *in rem* does not incur personal liability (save for costs) he is necessarily to be regarded as being a stranger to the suit and not entitled to counterclaim. The arrest of a maritime *res* and the institution of an action *in rem* has the inevitable consequence of involving the owner in the proceedings. Indeed, as pointed out by Goff J in *I Congresso del Partido* [1978] 1 All ER 1169 at 1191, 'he (the owner) must either fight the case or surrender his ship'. The question whether the true nature of the

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<sup>38</sup> *SA Boatyard CC (t/a Hout Bay Boatyard) v The Lady Rose (formerly known as the Shiza)* 1991 (3) SA 711 (C) at 715G – 716E

<sup>39</sup> Now rule 10.

<sup>40</sup> Such criticism as is embodied in these texts is fairly muted and not directed at the case where the owner is already personally liable and the consequences of such an owner participating to contest that liability.

action *in rem* is an action lying against a thing or against a person or persons having an interest in the thing, is one which has been the subject of much debate. Historically, *in rem* proceedings were used as a means of compelling appearance (*The Father Times* [1979] 2 Lloyd's LR 364 at 368); but it is probably an over-simplification to regard the action merely as a procedural device to compel the owner or other interested party to enter an appearance, as is sometimes suggested. The action undoubtedly focuses on a maritime *res* 'against or in respect of which the claim lies' (s 3(5) of the Act). On the other hand, it does not totally ignore the person or persons having an interest in the *res* (see for instance the provisions of s 3(6) and 3(7) relating to associated ships) and has been appropriately described by Professor Jackson as having a 'curious hybrid nature' (Jackson (op cit at 85)). For the present purpose, however, it is unnecessary to have to decide upon the true nature of the action *in rem*. Whatever that may be, it is at least clear that the action cannot be regarded as simply an action against a *res* without reference to the owner or person having an interest therein. This is particularly so where, as in the present case, the action is dependent upon the existence of a claim *in personam* against the owner (s 3(4)(b) of the Act). Even where the claim is founded upon a maritime lien, the owner, of course, remains involved to the extent that he is compelled, in the absence of payment, to defend the action or lose his ship or other maritime *res*. In these circumstances, to regard him, for the purpose of Admiralty Rule 8, as being someone entirely different from the defendant, *viz* the maritime *res*, and therefore unable to counterclaim, would be to adopt an approach which, in my view, is unnecessarily technical and could not have been what was intended.'

The statements in this judgment in regard to the purpose of rule 8(3) and the nature of the action *in rem* are plainly *obiter dicta* as the basis upon which the court resolved the case was that, whatever the nature of the action, it would be unduly technical to construe the relevant rule as precluding the owner who had entered appearance in an action *in rem* from bringing a claim in reconvention. As already mentioned rule 8, now rule 10, has been amended to reflect that the judgment correctly reflects the position. In doing so it fortifies the notion that to ignore an owner which is defending proceedings *in rem* is impractical and unrealistic. Accordingly this judgment also does not stand in the way of the construction of rule 8(3) advanced above.

That leaves the decision in *The Argun*.<sup>41</sup> The issue in that case was whether an action *in rem* brought by members of the crew had lapsed as a result of the lapsing of the original arrest of the vessel at their instance. It was argued that the effect of rule 8(3) was to reverse 'the rule in the

English case of *The Dictator*'. Having set out, but not approved this argument, the court dealt with and rejected an argument based on the decision in *The City of Mecca*<sup>42</sup> and after quoting the passage cited above from *The August 8* said:

'[26] If the present case had been heard in England, therefore, on the lapsing of the arrest of the vessel the actions would at the very least have continued as actions *in personam* against the vessel's owner. That that is not our law is clear from Rule 8(3), the material provisions of which are quoted in para [20] of this judgment.'

On the facts of the case the owner of the vessel was not personally liable for the claims and it was not submitted to the jurisdiction or assumed liability in some form. The only basis for the action *in rem* was accordingly the maritime lien that the claimants enjoyed over the vessel. In that situation it is by no means clear, for the reasons already discussed, that in England the owners would have incurred personal liability on the claims by entering an appearance to defend the action *in rem*. However, in South Africa the position would undoubtedly be that they would not incur personal liability and to the extent that the position might have been otherwise under English law, rule 8(3) does indeed make it clear that this is not the position in this country.

In my view therefore the South African cases, notwithstanding some apparently wide statements about the impact of rule 8(3) on the principles laid down in *The Dictator*, do not construe that rule in a fashion that renders those principles inapplicable in South Africa. Nor is there any reason of principle or practicality that suggests that the decision in that case, formulated at as being confined to a situation where there is a pre-existing liability on the owner of the arrested vessel, should not apply in this country. If that is a correct approach to rule 8(3) that in dealing with the situation where the owner is personally liable it does not alter the liability of the owner, but where the owner has submitted to the jurisdiction of the court by defending the action without challenging the jurisdiction of the court it has no application, there is no reason not to follow *The Dictator* in those cases. It is the wider construction of the

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<sup>41</sup> *MT 'Argun' v Master and Crew of the MT 'Argun' claiming under case number AC 126/99 and others* 2004 (1) SA 1 (SCA), para [26]

<sup>42</sup> *The City of Mecca* (1879) 5 P 28.

principle in that case that gives rise to potential difficulties. In South Africa it is submitted that it is unnecessary to debate the matter in great detail because a wider imposition of liability would founder on the constitutional principles discussed in chapter 9. The imposition of liability where none would otherwise exist, merely by virtue of the person concerned having sought to defend their ownership of the vessel, would result in an arbitrary deprivation of property in the broad sense that has been given to that expression by the Constitutional Court. To permit a judgment, capable of being executed against all of a person's property, to be entered against a person where they have no personal liability for the debt giving rise to that judgment would in my view clearly amount to an arbitrary deprivation of property.

The situation of the owner of a vessel arrested as an associated ship is more complex. Firstly it must be borne in mind that there are two types of associated ship – the sister ship and what has been referred to in this work as the true associated ship. In the case of a sister ship where the owner is personally liable and enters appearance to defend there seems to be no reason of principle or convenience that would exclude the operation of the rule in *The Dictator* to that owner. Although the action has commenced and proceeds against the associated ship (and if the owner does not intervene the claimant is limited to the value of that vessel) where the owner does intervene it is defending its own personal liability in just the same way as would be the case if the action had been brought against the ship concerned. It is submitted that it should have the same consequences. The position in regard to the true associated ship is however different.

It has been argued in chapter 9 that the institution of the associated ship is one that can survive constitutional scrutiny because of the close links that must exist between the companies that own the ship concerned and the associated ship. In other words it is constitutionally permissible for ship X to be arrested and proceeded against *in rem* in respect of a claim arising from the operations of ship Y, provided the requisite link between the ship-owning companies, in the form of common control on the relevant dates, is established. That link continues to exist whether the liability is viewed as a liability against the vessel or a liability of its owner. The jurisprudence of the Constitutional Court does not appear to rule out circumstances where

personal liability is imposed on A for the debts of B. The question will always be whether the connection between A and B is sufficiently close for that imposition of liability to be arbitrary. Thus it is improbable that the Constitution outlaws the long-standing power of courts to pierce the corporate veil in circumstances of fraud or other dishonesty and impose personal liability on a controlling shareholder instead of or in addition to that of the company that is primarily responsible for the wrong in question. Similarly it was argued that the connection created by common control of the ship-owning companies is such as to justify the attachment of associated ship liability. Whilst in the case of one-ship companies the issue of any liability beyond the vale of the ship itself is largely academic, it seems to be straining at a gnat, having swallowed a camel, to exclude personal liability on the part of the owner of an associated ship if the owner enters the fray beyond attempting to establish that the association is ill-founded or seeking a stay or that the court decline jurisdiction. In other words there seems to be no practical reason for treating the owner of the associated ship any differently from the owner of the ship concerned.

The argument against this approach is one of construction of the Act itself in the provisions in respect of associated ships. Those provisions do not say that the owner of the associated ship is liable for the debt, but that the associated ship may be arrested in an action *in rem* in respect of a claim against the ship concerned. In other words the statute does not speak of any personal liability on the part of the owner of the associated ship, although as pointed out above such liability may exist in the case of sister ships. In that sense to impose such personal liability in the case of the true associated ship as a consequence of the owner seeking to defend their vessel goes beyond the provisions of the Act itself. It must be borne in mind that the liability of the associated ship is a creation of the legislation and it would be a strange situation were procedural steps by the vessel's owners to result in the imposition of a more extensive liability than that contemplated by the relevant provisions of the Act, by virtue of a concept of the action *in rem* not attuned to or formulated in the light of this development. Even if one accepts a theory of the nature of the action *in rem* that recognises it as a procedural means of impleading the owner of a vessel, so that the true associated ship arrest is seen as a means of

suing a person other than the person liable for the debt, which is consistent with what was said in the judgments in *The Berg*,<sup>43</sup> it does not necessarily follow that the intention of the legislature was that the liability of that owner would extend beyond the vessel itself. The point can be illustrated with the simple, albeit factually improbable, example of a company owning the associated ship that is also possessed of other substantial assets. The Act provides that the associated ship can be arrested in proceedings *in rem* in respect of a maritime claim arising in respect of the ship concerned. It does not say or even suggest that the other assets of the owner of the associated ship will be placed at risk by the recognition of the action against the associated ship. Any such liability would not therefore arise from the terms of the Act but from the application of a rule pronounced in the context of the personal liability of the shipowner at a time when an institution such as an associated ship was not even contemplated.

Overall it is submitted that the argument from the construction of the Act must prevail, however odd that may seem in practical terms. It is accordingly submitted that the principle in *The Dictator* does apply in South Africa, but only in the case of the owner of either the ship concerned or a sister ship who is also personally liable for the maritime claim that is the subject of the action. Where there is no such liability, or in the case of the owner of the true associated ship, neither the entry of appearance to defend nor the conduct of the defence amounts to anything more than a submission to the jurisdiction in respect of those matters (including obviously costs) for which the intervening owner is personally liable and no more. That is not to say that there is no submission to the jurisdiction. It merely says that Shaw is correct in the comment quoted above in saying that a submission to jurisdiction does not give rise to a liability for the claim. Any such liability must flow from other factors.

The implication of this conclusion is that the characteristic of an action *in rem* under consideration falls to be formulated more narrowly insofar as this country is concerned. It is suggested that the proper formulation for South African purposes is the following. Giving notice

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<sup>43</sup> *Euromarine International of Mauren v The Ship 'Berg'* 1984 (4) SA 647 (N). and *Euromarine International of*

of intention to defend an action *in rem* does not attract any personal liability save in respect of costs. Where the person giving such notice is personally liable on the claim and defends it up to the stage of *litis contestatio*, without challenging the jurisdiction of the court or asking the court to decline jurisdiction or stay the proceedings, that constitutes a submission to the jurisdiction of the court in respect of the claim and the judgment constitutes a final and binding determination against such person of their liability in respect of that claim. The consequence of this from a procedural point of view is that the pleadings could be amended and judgment sought jointly against the vessel and such person as has long been the practice in England. To that extent the principles of *The Dictator* are still applicable in South Africa and we have not reverted to some previous and probably mythical ‘pure’ form of the action *in rem*

(d) **If the owner does not appear the claimant is limited to the realisable value of the *res*.**

This rule is well-established.<sup>44</sup> It is also very ancient having its roots in the procedures adopted in maritime courts discussed in chapter 2. Those procedures, which were, as already established, common to a number of mercantile courts, were based on a theory of contumacy. Where they were commenced by the arrest of property and there was no appearance the courts would after a period of time and the making of three demands adjudge the property to the claimant. Accordingly the claimant would only be able to recover in those proceedings an amount represented by the value of the goods. That is the position in admiralty and it was reinforced in England by issue of writs of prohibition as the common law courts sought to suppress the Admiralty Court and the civilian lawyers responded by claiming that the action lay only against the *res*, a form of proceeding not recognised in the common law courts. In substance it means that the owner chooses to abandon the vessel rather than seek to protect its interest. That will usually be because the owner is either not in a position to defend the vessel or

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Mauren v The Ship ‘Berg’ 1986 (2) SA 700 (A).

<sup>44</sup> *The Banco* [1971] 1 All ER 524 (PDA and CA) at 53. Its continuing operation was however queried by Brandon J in *J H Pigott & Sons Ltd v Owners of the Conoco Britania (The Conoco Britannia)* [1972] 1 Lloyd’s Rep 342. However nothing appears to have come of that query and for present purposes the position is as stated in the rule.

is satisfied that there is no purpose in doing so. Whether there is anything to be said for the notion that this principle may have its roots in the concept of noxal surrender as suggested by Shaw<sup>45</sup> it is hardly helpful in the present day and age and perhaps an improbable characterisation even to the civilians practising in admiralty. The principle is consistent with the provision in Admiralty Rule 4(7)(a) that the release of the arrested property may be obtained by giving security for the claim or the value of the property.

In many ways the rule is a matter of commonsense. If the only thing before the court is the ship that has been arrested and the owner is absent and has not submitted to the jurisdiction, there is little point in a court pronouncing for a greater liability than can be recovered by selling the ship. A judgment pronounced against an absent defendant, which has not been served, will not be recognised internationally and is contrary to the basic principle that courts should only exercise jurisdiction over a person within its jurisdiction or who submits to that jurisdiction or who is in some other way connected with that jurisdiction so that it is appropriate to exercise that jurisdiction. The mere presence of property within the jurisdiction does not ordinarily satisfy these criteria, but there is no practical reason for the court not to exercise jurisdiction on the basis that its judgment will be limited to what can be recovered by the sale of that property.

The critics of the judgment in *The Indian Grace (No 2)* contend that the notion that the action *in rem* is procedural is inconsistent with the fact that where the owner does not enter the lists to defend the action a claimant is limited to the value of the *res*. If the action is in truth, notwithstanding its outward form, an action against the owner of the vessel then there is no reason, so it is argued, for the effect of the judgment to be limited to the value of the vessel. The judgment is a judgment against the owner and there is no reason why it should be limited in this way forcing the claimant to seek recovery of the balance due by way of a separate action against the owner. Accordingly it is said that the action must be one against the vessel and judgment is

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<sup>45</sup> D J Shaw, *Admiralty Jurisdiction and Practice in South Africa*, 31. Holmes J in the United States also suggested that this was a possible source analogous to the common law notion of deodand.



granted *in rem*<sup>46</sup> so that to say it is against the owner is incorrect.

The difficulty with this argument is that by framing the question in this fashion the answer necessarily follows. The underlying presumption is that if the action is against the owner then it should lie for the full amount of the debt and to limit it to the value of the *res* necessarily conveys that its characterisation is incorrect. However, if the question is framed differently it leads to a different result. Thus it could be asked why, if the judgment is not one against the owner of the vessel, it should then lead to the owner losing its vessel in satisfaction of the claim? Such loss flows directly from the judgment itself and it is cold comfort to the owner of the vessel to be told that the action did not lie against them but against their vessel. As the United States Supreme Court said; ‘To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. In the matter of liability, a man and his property cannot be separated.’<sup>47</sup> A judgment resulting in a person losing their property can only be justified on the basis of the personal liability of the owner or on the basis of the owner being bound to submit to the existence of a security interest over the *res*. To say therefore that the action is against the vessel is merely a shorthand way of saying that it is against the owner of the vessel but the amount of the claim is limited for reasons of substance or procedure. Denying or ignoring the real effect of the action does not assist in understanding the restriction on the extent of the owner’s liability. It is suggested that it is better to look at the reason for the restriction rather than to use the restriction to espouse a different explanation of the nature of the action.

The effect of the limitation is that the court can only give judgment for the value of the *res*. The roots of this lie in history and early practicality, when enforcement of judgments obtained in one court in another court would have been less easy than it is today, rather than in any point of principle concerning the identity of the defendant. It has already been noted that from the perspective of international comity in the enforcement of the judgments of foreign courts many countries do not recognise a jurisdiction founded upon the attachment of property regarding that

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<sup>46</sup> Teare, *op cit*, 34.

<sup>47</sup> *The City of Norwich* 118 US 468, 503.

jurisdiction as exorbitant. One can start with the Roman Law where the principle *actor sequitur forum rei* applied and progress to the various procedures developed by mercantile courts to secure jurisdiction over traders by arrest of person or goods, which as already noted was initially designed to induce a consent to the local jurisdiction, to see the origins of the reluctance to recognise jurisdiction founded upon arrest alone. In its form as developed in Roman-Dutch practice it is described by no less an authority than Wessels as ‘a peculiar and unusual’ practice.<sup>48</sup>

It is hardly surprising therefore that in its English manifestation as developed in the Admiralty Court the courts limited the scope of their awards to the value of the *res* or the bail where bail had been given to secure the release of the property arrested. Until the changes brought about by the Judicature Acts the enforcement of a judgment in admiralty for an amount exceeding the value of the *res* would have been problematic. The Admiralty Marshall would have been able to realise the vessel or other property arrested but even in England itself no mechanism existed for enforcing a judgment beyond that. Hence the acceptance of the rule that the judgment of the Admiralty Court was restricted to the value of the *res* or the bail. In *The Dictator* there was a partial escape from this straitjacket in circumstances where an owner personally liable entered an appearance to defend the action. However, no similar escape route lay open where the owner did not appear. In essence the action, even if characterised as an action impleading the owner from the outset, was one where the court’s jurisdiction was founded upon arrest and a judgment against the owner where jurisdiction is based solely upon the arrest of the vessel or other maritime property suffers from the same difficulty as a judgment based upon an attachment of property *ad fundandam et confirmandam jurisdictionem*.

The rule can therefore be justified on pragmatic grounds relating to the enforceability of the ultimate judgment granted by a court in *in rem* proceedings. The action is always one in

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<sup>48</sup> Wessels J H, *History of Roman Dutch Law*, 687. Article 3.2 of the European Jurisdiction Regulation apparently prohibits the founding of jurisdiction on the seizure of property with an exception being made for an arrest pursuant to the Arrest Convention. See Derrington & Turner, *op cit*, 23.

which the owner of the vessel is impleaded from the outset, but where the sole foundation for the court exercising its jurisdiction is the arrest of the vessel without any action by its owner constituting a submission to the court's jurisdiction the court will refrain from granting judgment for an amount greater than the value of the *res*, leaving the claimant to pursue the balance of the claim by such other means as may be available. It can be characterised as an exercise of judicial restraint by the court seised of the action. The question in South Africa would be whether similar restraint should be exercised by our courts in actions *in rem* bearing in mind that at common law we do recognise a jurisdiction based upon attachment of property as providing a proper foundation for the court both to exercise jurisdiction and to grant a judgment against the owner of the property for the full value of the claim, leaving it to the claimant to enforce that judgment elsewhere if it is able to do so.

In dealing with this issue it is submitted that the role of history becomes important. When considering other aspects of the action *in rem* earlier in this chapter the basis for departing from any established view of the nature and consequences of the action have been found in the language of the Act or the impact of the Constitution or the basis for the associated ship arrest or a combination of those elements when seen in the light of our civil law heritage. Otherwise due credit has been given to the stated intention of the Law Commission that it aimed to preserve for South African admiralty proceedings the action *in rem* derived from England via the Colonial Courts of Admiralty Act.

There is some incongruity in a situation where if a claim is pursued by way of an action *in personam* and the attachment of a ship, it will result in a judgment against the owner irrespective of whether the owner defends the action, but if the same claim is pursued *in rem* commencing with the arrest of the same ship any judgment will be limited to the value of the *res* but it is submitted that this provides an insufficient basis for departing from the existing rule. It has already been mentioned that there is a difference between an attachment to found jurisdiction and an arrest insofar as the ability to secure the release of the vessel by furnishing security is concerned. That may result in due course in an equality challenge or a rationality challenge

under the Constitution, but it is difficult to predict what the outcome of such a challenge would be. There does not appear to be any convincing constitutional reason for favouring the common law rule over the admiralty rule or vice versa so this must be taken as speculative until such a challenge is brought. One can only predict that the challenge is likely to come from a shipowner whose vessel has been attached rather than one whose vessel has been arrested *in rem* as the latter enjoys the more favourable regime as far as security is concerned. In addition as attachments are increasingly rare because of the extensive *in rem* jurisdiction it may be some time before this issue is raised if it ever is.

Returning then to the principle that where the owner does not appear judgment is limited to the value of the *res* there does not seem to be any good reason why in South Africa that should not be adhered to. Nor is there any reason why it should be altered or adapted in any way. It can be applied as easily in relation to an associated ship as to the ship concerned and if anything the case for its application in that instance is stronger, because the associated ship jurisdiction imposes a unique liability on the owner of the associated ship. Accordingly it is accepted that this principle continues to apply to *in rem* proceedings in South Africa.

(e) **Persons other than the owner may enter appearance in order to defend their interest in the vessel.**

Again this rule is well-established. It gives recognition to the fact that when a vessel is arrested a number of separate interests may be involved. If the vessel is under charter the charterer may be affected. If there is a risk that the vessel may be sold that will affect the interests of the mortgagee. Both the vessel and its cargo are likely to be insured and their interests could be affected by an arrest. The effect of the rule is that they are free to intervene in the action to defend it in order to protect their own interests even if they are not personally liable for the claim. If they choose to intervene then they incur a liability for costs but no personal liability in respect of the claim itself.

However unusual the operation of this rule may seem in the context of civil proceedings in England – a matter on which I make no comment – it does not seem to be in any way unusual or odd in South Africa, where our courts have in other instances exercised their power to regulate their own proceedings in such a way as to ensure that parties having legitimate claims or defences are afforded an opportunity to have those claims or defences advanced on their behalf. Thus in cases where distance and problems with communication or the advent of war prevented a party from commencing action when the failure to do so with expedition might lead to the claim being lost the court has authorised intervening parties having no direct connection with the litigation to bring such proceedings in the name and on behalf of such persons.<sup>49</sup> Where the fact that a country had been overrun by Hitler's army in World War 2 meant that it was probable that a company being sued in South Africa would be unable to defend an action brought against it by a former director, the court authorised a South African associated company to defend the proceedings on its behalf.<sup>50</sup> In terms of section 173 of the Constitution the High Court has inherent power to protect its own process and to develop the common law taking account of the interests of justice. In terms of section 34 of the Constitution everyone has a right of access to courts. These powers are extensive and enable the courts to ensure that parties having an interest in proceedings can be properly represented before them.<sup>51</sup>

Against that background the rule that parties having an interest in or affected by the arrest *in rem* of a vessel are entitled to intervene in and defend the proceedings without incurring any liability other than one for costs is consonant with the basic principles recognised by our courts and is certainly applicable to an action *in rem* in South Africa, whether against the ship concerned or against an associated ship. If anything the latter jurisdiction would highlight the need for such a rule were it not already recognised.

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<sup>49</sup> *Ex parte Hattersley* 1904 TH 258; *Abroms v Minister of Railways and Harbours* 1917 WLD 51.

<sup>50</sup> *Ex Parte Skodaworks S.A. (Pty.), Ltd.; In Re Gompels v Skodawerke, Prague* 1941 TPD 29.

<sup>51</sup> See the recent analysis of this power in *Manong v Minister of Public Works* (518/2008) [2009] ZASCA 110

(f) **A cause of action in rem does not merge in a judgment in personam.**

In the Court of Appeal in *The Indian Grace (No 2)*<sup>52</sup> Staughton LJ described this principle in the following terms:

‘It is well established since the time of Dr. Lushington that a plaintiff who has an unsatisfied judgment *in personam* can proceed by an action *in rem*. (Presumably there would be no advantage in doing so unless there had been a change in ownership of the vessel; otherwise the plaintiff could employ ordinary methods of execution<sup>53</sup>...) Similarly a plaintiff who has proceeded *in rem*, recovered judgment against the vessel, and is left with it only partially satisfied, may start a second action *in personam*.”

In saying this Staughton LJ was highlighting a possible anomaly in regarding the action *in rem* as being purely procedural and directed against the owner of the vessel from the outset. The point is that if the case was always one against the vessel’s owner then any judgment should also be a judgment against the owner and should preclude any further action on the same claim. This follows from the rule in England that once a judgment has been delivered in an action the cause of action is merged in the judgment and can no longer be the subject of a further claim.<sup>54</sup> The anomaly would arise from allowing two actions against the same person on the same claim.

Lord Steyn brushed this anomaly aside by suggesting<sup>55</sup> on the basis of counsel’s agreement that the rule was established in cases involving maritime liens and ‘is an ancient and strange rule

<sup>52</sup> *The Indian Grace (No.2)* [1996] 2 Lloyd's Rep 12 (CA).

<sup>53</sup> This being so the practical application of the rule would be limited to cases where the claim gave rise to a maritime lien otherwise the change in ownership would prevent the claimant from proceeding against the vessel *in rem*. Derrington and Turner, *op cit*, 34 make the same point but extend it to the situation where the proceedings have been issued and there is then a change in ownership of the vessel, in other words the situation encompassed by the decision in *The Monica S*. However, for reasons set out above that latter principle is not applicable in South Africa.

<sup>54</sup> As to the merger rule see Jackson D C, *Enforcement of Maritime Claims* (4<sup>th</sup> Ed), 647-8. In *Comandate Marine Corp v Pan Australia Shipping (Pty) Ltd* [2006] FCAFC 192, para 118 the fear is expressed that the adoption of the approach that the action is always one against the owner of the vessel will render the choice of procedure a lottery by precluding an action *in rem* after an unsuccessful action *in personam*. For my part I am unable to see why the acceptance that the claim is against the owner requires a merger of the cause of action in the judgment and that would not appear to be required by South African law.

<sup>55</sup> Incorrectly as pointed out by Young J in *The 'Irina Zharkikh and Ksenia Zharkikh'* [2001] 2 NZLR 801; [2001] 2 Lloyd's Rep 319.

which I would not wish to extend beyond the limits laid down by authority'. Critics of his decision have pointed out that the problem cannot be avoided quite as easily as that<sup>56</sup>. Viewed from a South African perspective however it may be that what Lord Steyn regarded as strange is perfectly acceptable because in our law there is no automatic merger of a cause of action in a judgment on that cause of action. The approach of the Roman-Dutch law is to treat (by way of a fiction according to Voet<sup>57</sup>) a judgment or arbitration award as a form of novation on the theory that the parties have agreed to be bound by the judgment. However, it is not a conventional novation, which is a voluntary contractual arrangement between the parties, but a compulsory novation (*novatio necessaria*) the effect of which is not to extinguish the debt on which the claim is based but to strengthen and reinforce the right giving rise to the claim.<sup>58</sup> The right to sue is ordinarily replaced by a right to execute but the original obligation on which the claim was founded is not extinguished.<sup>59</sup>

At most therefore in South African law a judgment on a maritime claim may found a contention that the *exceptio rei judicatae* is available. However in the present context that is hardly a defence that the owner of the vessel would wish to raise as it would involve a concession that the judgment was one given by a competent court in proceedings between the same parties in respect of the same claim.<sup>60</sup> The inevitable result of such an approach would be that the claimant would seek an order to execute upon the judgment. In any event in the context of an action *in rem* where the owner had not intervened in the proceedings the answer to that

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<sup>56</sup> *The 'Irina Zharkikh and Ksenia Zharkikh' op cit*; West M, *Arbitrations, Admiralty actions in rem and the arrest of ships in the Hong Kong SAR: in the twilight of the Indian Grace (No 2)*, [2002] LMCLQ 259. Again the arguments in this regard revolve around the merger of the claim in a judgment or arbitration award. A particular problem to which they draw attention is the problem of mandatory stays of proceedings arising out of arbitration clauses where a vessel is arrested *in rem* in order to obtain security and any application for a stay of proceedings is resisted unless it is made a condition of the stay that alternative security be provided for the arbitration proceedings. See *The Rena K* [1979] 1 All ER 397 [QB (Adm Ct)]; [1979] 1 Lloyd's Rep 545 [QB (Adm Ct)]. These problems do not arise in South Africa by virtue of the provision for a security arrest in section 5(3) of the Act. Accordingly this is not a concern in South Africa insofar as the characterisation of the action *in rem* is concerned.

<sup>57</sup> Voet 46.2.1.

<sup>58</sup> *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 308B-310F; *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 940E-944H.

<sup>59</sup> *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 453B-455H.

proposition would presumably be that as the judgment *in rem* is confined to the value of the *res* the claim has not been fully and finally determined and is not exhausted by the previous proceedings. Conversely if a claim *in rem* is sought to be pursued after a judgment *in personam*, which as already pointed out would only be necessary where the claim gave rise to a maritime lien and the person personally liable for the debt was not, or no longer, the owner of the vessel in respect of which the claim arose, the answer would be that the claim lies against a different person, namely the owner of the vessel burdened by the lien and the security right given by the maritime lien had not been considered or exhausted by the judgment.

For those reasons therefore it is submitted that the traditional rule in regard to actions *in rem* that the underlying maritime claim does not merge with the judgment in such an action and similarly that a judgment *in personam* does not preclude a subsequent action *in rem* is in any event consistent with basic legal principles concerning the effect of a judgment in South African law. The anomaly that troubled Staughton LJ appears to arise from a different approach to the effect of a judgment on the existence of the underlying claim and does not pose any obstacle or create any anomaly in South Africa whether as to the application of this principle to actions *in rem* or to understanding the action as a procedural device directed at the owner of the vessel. In the case of an action *in rem* against an associated ship the same principle applies *a fortiori*. After all the judgment against the associated ship is not on any basis one against the party personally liable in respect of the maritime claim and a contention that *res judicata* applied would be met with the retort that an entirely different person was involved as defendant in the action.

**(g) The claimant in an action *in rem* may procure a warrant of arrest after judgment.**

In England this now flows from a provision of the Civil Procedure Rules and gives effect

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<sup>60</sup> *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239, para [2]; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA), paras [21] and [22].



to the decision of the High Court in Singapore in *The Daien Maru No 18*.<sup>61</sup> There the vessel was under charter and the owners arrested her in proceedings to recover possession from the charterers. Various members of the crew entered a *caveat* against the vessel's release and then commenced proceedings against the owners for wages, subsistence and expenses for returning home. After summary judgment had been entered in their favour they sought and obtained the arrest of the vessel. Their right to do so was challenged but upheld on the basis that provided there had been no prior arrest and bail had not been given for the claim such an arrest was permissible.

This attribute of an action *in rem* in other jurisdictions is not a feature of the action in South Africa because in terms of section 3(5) of the Act an arrest of the vessel (or a deemed arrest in terms of section 3(10(a) of the Act) is a necessary pre-requisite to the bringing of an action. The section provides that an action *in rem* 'shall be instituted by the arrest' of property against or in respect of which the claim lies. The effect of that section has been the subject of authoritative interpretation in the case of *The Jute Express*<sup>62</sup> where it was submitted and accepted that the purpose of this section is to lay down as a matter of procedure in such an action in South Africa that an arrest of the vessel or other property in respect of which the claim lies is necessarily required. Such an arrest could either be an actual arrest or a deemed arrest under section 3(10(a) of the Act. According to Howie AJA giving the judgment of the Court the primary purpose of an arrest is to give the action utility and effectiveness by affording the claimant pre-judgment security. That purpose is achieved by making an arrest, actual or deemed, an essential requirement for pursuing such an action.<sup>63</sup> It is 'an essential element of the process whereby an action *in rem* is to be brought to court'.<sup>64</sup> That has not been altered by the subsequent amendments to the Act.

It follows that the procedure followed in *The Darien Maru No 18* could not have been

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<sup>61</sup> *The Daien Maru No 18* [1986] 1 Lloyd's Rep 387; [1984] SGH C 43.

<sup>62</sup> *MV Jute Express v Owners of the cargo lately laden on board the MV Jute Express* 1992 (3) SA 9 (A).

<sup>63</sup> At 17J-18C.

<sup>64</sup> At 18H-I.

followed in South Africa. The crew members could have entered a *caveat* against the release of the vessel from arrest, as they did in Singapore,<sup>65</sup> but they would either have to have obtained security for their claims or themselves arrested the vessel in order to pursue an action. Accordingly the problem dealt with in that judgment and now addressed in England under the Civil Procedure Rules does not arise in South Africa and an action *in rem* in this country lacks this feature. What is of greater significance about this point is that it illustrates the truth of the point made earlier in this chapter that the action *in rem* is no longer, if it ever was, purely a creation of the courts and some stream of maritime and mercantile law, but is a creation of statute and rules that will determine its scope and effect and thereby identify its nature and consequences.

(h) **Once arrested the vessel may be sold in which event claims are transferred to the fund in court.**

It is unnecessary for this principle to be discussed in any detail because in South Africa the power of the court to order the sale of a vessel or other property arrested in terms of the Act is wholly statutory and embodied in section 9 of the Act. That section provides that a court may at any time in the exercise of its admiralty jurisdiction order the sale of property arrested under the Act and when it does so the proceeds accruing from the sale constitute a fund to be held in court and dealt with in accordance with the rules. The court may in terms of section 10A make an order with regard to the distribution of the fund and it is customary in practice to refer the matter to a referee to receive claims and report to the court on the distribution of the fund having regard to the claims received and the priorities attaching to those claims in terms of section 11. Where claims are brought against the fund on the basis that the vessel sold was an associated ship special provision is made in respect of the ranking of such claims.

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<sup>65</sup> Admiralty Rule 4(4)(a). The property can then only be released from arrest if security is given for the claim of the person entering the *caveat* (Admiralty Rule 4(7)(b)(ii)).

**(i) Service on the owner is not required in an action *in rem***

This is not listed as a separate feature of the action *in rem* by Derrington & Turner, although they mention it as a unique feature of the admiralty jurisdiction that a claim form in an action *in rem* is served upon the ship and not its owner.<sup>66</sup> However if the action is one that lies against the owner of the vessel the usual rule would require that there be some form of service upon the owner. Technically that is undoubtedly correct but in this modern era of easy communication where courts frequently permit service to be effected other than personally by an officer of the court this departure from the norm is of little practical significance and is rightly not elevated to a feature of the action *in rem*. After all it would take only a minor alteration in the rules governing service to require that a copy of the warrant of arrest and summons be served personally upon the owners in any of the various ways in which process is served in foreign jurisdictions under the rules of court. That would not alter the nature or effect of the action in any way. Accordingly this can be disregarded.

**2 THE FEATURES OF AN ACTION *IN REM* IN SOUTH AFRICA**

This comparison between the features of the action *in rem* in England and other countries that take their lead from it and the provisions of the Act in regard to such actions, when construed in the light of the Constitution and our common law reveals that whilst there is substantial correspondence between the South African version of the action *in rem* and its counterparts elsewhere there are also significant differences. By and large those differences make it easier to regard the action in South Africa as procedural in nature and directed against the owner of the vessel that is the subject of arrest. Most of the problems that concern writers on the topic in other jurisdictions do not arise here in part because, as argued above, rules such as those in *The Monica S* and, in its more extreme expression, *The Dictator* are not compatible with the Act and the Constitution. Others are viewed from a different perspective in this country

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<sup>66</sup> Derrington & Turner, *op cit*, 10. Under Admiralty Rule 6(2)(a) service of the summons and the warrant of arrest is effected by affixing a copy to the mast or any suitable part of the ship and handing a copy to the Master or other person in charge of the ship.

because of our common law rules. One can therefore seek to distil the features that characterise the action in South Africa and then move on to a closer examination of those features in the context of the associated ship.

It is suggested that the following features of the action can be identified. First it is a form of procedure aimed at bringing the owner of the vessel before the court either because of the owner's personal liability for the maritime claim or because the vessel is burdened with a charge in the form of a maritime lien<sup>67</sup> of which South Africa recognises the six classic liens of English law namely (1) salvage, (2) collision damage, (3) seaman's wages, (4) bottomry, (5) master's wages and (6) master's disbursements.<sup>68</sup> Second where a claim is pursued on the basis of the personal liability of the shipowner in respect of a claim not giving rise to a maritime lien the claimant acquires a statutory lien over the vessel at the time of its arrest. Such an arrest, whether actual or deemed, is an essential feature of an action *in rem*. Accordingly no action can be brought in the absence of an arrest. Because the date of arrest is the significant date as far as the accrual of the statutory lien is concerned the position cannot arise that the action proceeds against a person other than someone personally liable for the claim and the action remains from its commencement an action that is expressed in the form of an action against the vessel, but is in fact an action against its owner. Third and because the action is one in which the owner of the vessel is impleaded, notwithstanding its outward form, if the owner intervenes to defend the proceedings or so conducts itself as to convey that it is submitting itself to the jurisdiction of the court any judgment granted is effective as a judgment against the owner and it would be permissible, subject to appropriate amendment of the summons and pleadings, for the court to give judgment *in personam* against the owner.

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<sup>67</sup> Section 3(4) of the Act.

<sup>68</sup> *Transol Bunker BV v MV Andrico Unity and others Grecian-Mar SRL v MV Andrico Unity and others* 1989 (4) SA 325 (A). According to the judgment in that case a maritime lien referred to in section 3(4)(a) of the Act does not include a maritime lien according to the governing law of the debt, that is, the proper law of the contract, delict or statutory obligation. It must follow that the maritime liens referred to in para (y) of the definition of maritime claim in section 1(1) of the Act are confined to the traditional maritime liens recognised in South Africa and do not include foreign maritime liens recognised by the law of other jurisdictions.

Turning from matters that principally revolve around the identity of the defendant and the characterisation of the action to matters relating to the extent of the relief available to a claimant in an action *in rem*, where the owner of the vessel does not intervene and defend the action any judgment will be limited to the value of the vessel. This is so even where some other party, such as a charterer or mortgagee, intervenes to oppose and protect their own interest in the vessel as they are entitled to do. The only liability incurred by such persons is a liability in respect of the costs incurred consequent upon their intervention. The claimant acquires a right on arrest to approach the court for an order for the sale of the vessel in terms of section 9 of the Act. If the claimant successfully invokes that right it is entitled to pursue its full claim against the fund so created but its right to recover will be limited to the value of the fund. However to the extent that the claimant is unable to recover in full it is entitled to pursue its claim by way of a further action *in personam* against the party personally liable although in a world of one-ship companies that may not be particularly valuable. Conversely where the claim has initially been pursued by way of proceedings *in personam* against an owner personally liable for the debt those proceedings do not constitute a bar to an action *in rem* to the extent that the claimant has failed to recover payment of the debt.<sup>69</sup>

Next it is necessary to deal with the security interests that can be obtained or pursued by means of an action *in rem*. These are the maritime lien and the statutory lien (as it is called<sup>70</sup>) arising from the arrest of a vessel in an action *in rem*. One starts as always in this field with the statement by Sir John Jervis CJ in *The Bold Buccleugh* that:

‘A maritime lien is well defined. to mean a claim or privilege upon a thing to be carried into effect by legal process...., that process to be a proceeding in rem....This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.’

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<sup>69</sup> Where the party personally liable is not the owner the claim must be one on a maritime lien in order to proceed *in rem* and there could then be no question of those proceedings being barred by proceedings against a party bearing personal liability for the debt.

This statement, hallowed by oft quotation, tends to be regarded as having the status of Holy Writ in admiralty law (or lore). However close scrutiny suggests that it may be subject to the same difficulties of interpretation as any Biblical counterpart. Although the lien is described as ‘a claim or privilege’ this is surely wrong. It is not itself independent of some underlying claim and indeed the existence of such a claim is a necessary pre-requisite for the existence of a maritime lien. It is better therefore to say simply that it is a privilege or right of security (to use more familiar terminology) that attaches to various types of claim. In the conventional language of the classification of rights into real and personal rights it would be described as a real right because it attaches to a corporeal thing and survives a transfer of ownership.<sup>71</sup> What did Jervis CJ mean when he said that it is ‘inchoate’, that is, not fully formed, from the moment it attaches? Neither the nature nor the extent of the right alters between the date upon which the claim to which it is linked arises and the date when proceedings are brought to enforce the lien. Perhaps he had in mind that unlike other real rights no notice to the world is given of the existence of the right by way of registration such as occurs with ownership or, in the case of security, a mortgage. Lord Diplock, in a passage from his judgment in *The Halcyon Isle*,<sup>72</sup> says that this refers to the fact that no right of property is created by the maritime lien. If so it is an obscure way of saying it and there is nothing in the judgment of Jervis CJ that indicates that this was his concern. In a South African context it must be borne in mind that it reflects the very different approach to real rights of security between English and South African law. Also the fact that as Lord Diplock stated the security interest of a maritime lien may not be recognised in some jurisdictions and may be subject to procedural handicaps, such as the need to bring suit within a limited period of time, in others does not subtract from it or render it ‘evanescent’. It simply means that the ability to enforce the lien will vary from place to place, which is precisely the situation in England as a result of Lord Diplock’s majority judgment in *The Halcyon Isle*.

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<sup>70</sup> Professor Jackson prefers ‘statutory lien in admiralty’. *The Enforcement of Maritime Claims* 4<sup>th</sup> Ed, para 17.37, p467.

<sup>71</sup> Which I understand is not the case in certain European jurisdictions where it is treated as a personal right against the owner of the vessel.

There is substance in Jackson's criticism that the distinction between 'an "inchoate" right depending for its substance on the taking of legal proceedings and a right of substance which, if necessary, has to be enforced by legal proceedings' is purely semantic. He rightly asks whether the maritime lien is any more 'inchoate' (and I would add 'evanescent') than any substantive right, prior to its enforcement.<sup>72</sup> A person with knowledge of the underlying claim would say that the ship was as clearly burdened by the security given by a maritime lien as by a registered mortgage. It is the fact of the claim seen in the light of the legal consequences attached to such a claim by many, but by no means all, legal systems, that creates the security. The justification for the existence of any maritime lien lies in questions of policy not in the fact that it is capable of enforcement by way of an action *in rem*. The fact that different jurisdictions attach widely differing consequences to different claims, particularly in regard to priorities, and also vary widely in their enforcement of claims to maritime liens illustrates the fact that there is no settled international position in this regard and the failure to arrive at a broadly acceptable international convention in this regard demonstrates the impossibility of suggesting that the maritime lien and the action *in rem* are in some way inextricably linked. It is undoubtedly preferable to treat the two as separate, the one related to substantive rights of security over vessels and the other relating to the procedures to be followed in the enforcement of maritime claims.

Fortunately it is not necessary for present purposes to explore any further all the niceties of maritime liens. South Africa recognises a limited class of liens and provides for them to be enforced by an action *in rem* although there is nothing to prevent a creditor having the benefit of such a lien from proceeding *in personam* and if not paid executing against the vessel and claiming a preference based upon the lien. This follows from the fact that the order of priorities in ranking claims, whether against a fund in court or on execution after judgment, is prescribed in section 11 of the Act and the ranking of those claims depends more upon the nature of the claim than upon the existence of a maritime lien. Thus the claims are not defined on the basis of

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<sup>72</sup> *Bankers Trust International Ltd v Todd Shipyard Corporation: The Halcyon Isle* [1980] 3 All ER 197 (PC) at 203a-g

<sup>73</sup> Jackson D C, *The Enforcement of Maritime Claims*, 4<sup>th</sup> Ed, paras 18.22 and 18.23, p481.

whether they attract a maritime lien but according to their inherent character and the question of whether a claim enjoys a maritime lien is only relevant to the matter of priorities under section 11(4)(e) of the Act, where maritime liens not already dealt with earlier in the section are ranked after mortgages, hypothecation, rights of retention and other charges over the ship, and master's disbursements but before 'any other maritime claim', that is, any concurrent claim having no claim to any preference whatsoever. As it is rare in a case of compulsory sale for there to be any balance in the fund after discharging any mortgage over the vessel this is relatively academic. Accordingly in South Africa the prime importance of a maritime lien lies in the fact that the underlying claim to which the lien attaches can be pursued notwithstanding the sale of the vessel in which event the proceedings will have to be by way of an action *in rem*.

This advantage, that a security interest arises that is enforceable against a subsequent purchaser of the vessel, is likewise the principal feature of the statutory lien afforded a claimant in a maritime case in consequence of the arrest of the vessel. As in England it is accepted that a sale of the vessel after the security interest arises does not affect the right to continue the action to judgment and to seek to satisfy the judgment from the proceeds of the sale of the vessel. Unlike in England, where the statutory lien arises on issue of the summons, in South Africa it is submitted that it only arises on the arrest of the vessel at a stage when the owner thereof is a party personally liable in respect of the underlying maritime claim. The source of this lien is the maritime claims specified as such in section 1(1) of the Act although not all such claims can give rise to a statutory lien, because by their very nature they are incompatible with such a lien. Thus one cannot speak of a statutory lien arising in relation to the arrest of a ship in a claim to ownership of the vessel or for possession or delivery of the ship. Nor does one acquire a statutory lien over a fund in court as a result of proceedings *in rem* against the fund. Difficulties may also be experienced in respect of some other claims<sup>74</sup> and the nature of the relief being sought will also be a relevant factor. However, where the claim is one sounding in money the

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<sup>74</sup> There are some maritime claims such as a claim to limit liability in terms of sub-para (w) of the definition of 'maritime claim' in section 1(1) of the Act and claims under policies of marine insurance that can probably only be pursued *in personam*.



effect of arresting a ship in an action *in rem* in South Africa is to give rise to a statutory lien over the vessel from the time of its arrest. The extent to which South African law affords such rights to a claimant is determined by the legislative decision in regard to the claims capable of being pursued in this way. Even that is not wholly clear because the legislature has seen fit to compound the existing situation that a maritime lien is a secret lien by providing that ‘any other matter which by virtue of its nature or subject matter is a marine or maritime matter’ is a maritime claim.<sup>75</sup> The result is that one cannot be certain in advance of any attempt to arrest property *in rem* under this heading whether it will be susceptible to arrest and accordingly attract the statutory lien. It is as well in those circumstances that the lien should not arise before arrest. The existence of such a lien has no effect on questions of priority

To sum up on this aspect of matters in regard to the nature of the action *in rem* it seems that the correct statement of the position in South Africa is not that the action *in rem* is the means for enforcing the maritime lien nor that it creates the statutory lien. It is rather the position that the action *in rem* provides a means of enforcing a maritime lien, where such exists under our law, and if such an action is brought in respect of a claim sounding in money it will from the time that the property in question is arrested attract a statutory lien. In the case of the maritime lien this means that from the time the lien arises, which is when the claim arises, a transfer in ownership does not affect the claimant’s security interest in the vessel as the ship will already be burdened with the security interest constituted by the lien. In all other cases it is only a transfer of ownership after arrest that results in the new owner receiving a vessel burdened with a security interest. However, once the security interest has been secured by way of arrest it is in all other respects identical. The security interest enforced upon the arrest of property in an action *in rem* will, however, be discharged on the sale of the vessel. Thus section 9(3) of the Act provides that any sale in terms of that section is one free of any mortgage, lien, hypothecation or any other charge whatsoever.

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<sup>75</sup> Section 1(1) of the Act *sv* ‘maritime claim’ para (ee).

### 3 THE ACTION *IN REM* AGAINST THE ASSOCIATED SHIP

Having identified the characteristics of the action *in rem* in South Africa it is time to consider those characteristics in relation to the action *in rem* against the associated ship to see which of them have to be altered to take account of the special nature of that jurisdiction. In *The Berg*<sup>76</sup> Milne JP said in regard to the action against an associated ship:

‘It is true that the cause of action, but for one important difference, remains the same. The mere fact that the applicant elected to arrest the *Pericles* instead of the *Berg* could not affect the nature, amount or enforceability of the applicant’s claim. It is inconceivable, for example, that the Legislature could have intended to deprive the owners of the *Berg* of any defence that would have been open to the owners of the *Pericles*.’

Although as a general proposition in regard strictly to questions of liability and the defences available to the owner of the associated ship that may be broadly correct as a statement of the effect of an action *in rem* against the associated ship as opposed to one against the ship concerned it is not entirely accurate. As we will see there are slight differences between the two that may affect these matters.

The starting point is one that drives us back to the debate over the nature of the action *in rem* itself and the question whether it is appropriate to describe it as solely a form of procedure. The Act does not say that the owner of the associated ship is liable for the debt, merely that the action *in rem* otherwise available to a maritime claimant may be instituted by arresting an associated ship instead of the ship concerned. However as the judgments in *The Berg* demonstrate this entitlement renders a person other than the owner of the ship concerned liable in respect of the claim. In both courts the suggestion that the associated ship arrest provisions were procedural in character was rejected. It was accepted that this afforded a new remedy to maritime claimants but in invoking the remedy it attached liability to a person not otherwise

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<sup>76</sup> *Euromarine International of Mauren v The Ship ‘Berg’* 1984 (4) SA 647 (N) at 655D-E.

liable in respect of the claim. The underlying principle expressed by the architect of the Act and accepted by the appeal court was that the purpose of the provisions was to make liability fall where it belonged by reason of ownership or where the vessel was owned by a company by reason of ownership or control of the shares of that company. Other than that the amendments have the effect that it is control of the company rather than control of its shares that now forms the foundation for the associated ship arrest that remains the position.

Does this necessitate a reconsideration of the proposition that the action *in rem*, at least insofar as it lies against an associated ship, is a form of procedure? It is submitted not. Certainly it provides no foundation for a resort to the notion of personification as the underlying basis for the associated ship arrest is that one is dealing with a vessel other than the vessel in respect of which the claim arose. Accordingly it is impossible to treat the associated ship as in some way the 'wrongdoer' in respect of that claim. It is submitted that by making the associated ship susceptible to arrest the legislature has done two things. In the first instance it has created a potential liability attaching to all owners of ships that, by virtue of the fact that they are appropriately connected with the owner or company owning the ship concerned, are liable to be arrested as associated ships in South Africa. That liability comes into existence at the same time as the maritime claim itself arises and continues thereafter for so long as the claim is enforceable but unpaid, provided the association continues. The fact that the statutory provisions are understood as creating a liability on this basis is illustrated by the fact that in practice fleet owners and operators seek advice from South African lawyers on how to structure their fleets in such a way as to avoid that liability.

The second aspect of these provisions is that they create a remedy appropriate to the enforcement of the liability thus established. That remedy is the action *in rem* against the associated ship. It is submitted that the provisions have two separate and distinct aspects namely a substantive attachment of liability to all owners of ships that are or may become associated ships in relation to the ship concerned whilst the debt remains enforceable and a procedural provision instituted in order to give effect to that liability. The substantive liability comes into

existence when the maritime claim arises or at any later stage when a vessel comes into the same ownership or under the same control as the ship concerned at the time when the claim arose. That liability is real and substantive and exists before the arrest of the vessel in proceedings *in rem* in South Africa. The reality will be testified to by many maritime practitioners who have advised ship owners of the risk of bringing their vessels into a South African port because of its susceptibility to arrest as an associated ship in this jurisdiction.

The substantive liability necessarily exists prior to the arrest of the associated ship although it can only have effect upon arrest. This is because the underlying maritime claim will arise and become enforceable by way of either an action *in rem* under section 3(4) of the Act against the ship concerned or by way of an action *in personam* against the party personally liable, but also becomes available. From that point, even if the underlying claim is not enforceable against the ship concerned by way of an action *in rem*, it will be enforceable by way of an action *in rem* against the an associated ship. It is submitted that it is unrealistic to say that the liability has not attached until there is an arrest. All that means is that until there is an arrest there is no practical basis for enforcing the claim. In principle that is no different from any other situation where the inability to sue the person liable in respect of a claim means that the claim is not in practical terms recoverable. Thus it is not correct to say that because a *peregrinus* is not present in South Africa and has no property in this country therefore they are not substantively liable in respect of a debt owed to an *incola*. The correct position is that they are liable but that at present that liability is not enforceable in the courts of this country. It can make no difference in principle that in this instance the liability is one that can only arise in South Africa.

It is suggested that it is appropriate to maintain this conceptual distinction between the liability imposed by these provisions on the owners of associated ships and the procedure by which that liability is enforced. One can then properly consider the underlying policy implications of the associated ship. These considerations are relevant to questions already debated at an earlier stage of this work such as the question whether it is permissible to arrest more than one vessel as an associated ship discussed in chapter 8. It is also relevant to questions

such as the extension of liability achieved by deeming a charterer to be the owner of the ship concerned so that there can be an associated ship arrest and an action *in rem* against the associated ship even when there could be no action *in rem* against the ship concerned and only an action *in personam* against the charterer as the party personally liable in respect of the claim. In substance the effect of this is to make property not owned by the party personally liable available to be arrested *in rem*. At the same time that party can be sued in an action *in personam*. If that is permissible why should it not be possible to commence the *in personam* action by way of an arrest of ‘associated property’, a question that has been debated in South Africa.<sup>77</sup> Confusing the liability accruing from the ability to arrest an associated ship with the procedure of arrest and the subsequent action is as unhelpful as suggesting that the basis for the arrest is either an extension of the sister ship provisions of the Arrest Convention or a form of piercing the corporate veil. By obscuring the true position it can mislead and hamper debate as a matter of principle on the future scope of the associated ship. That would be unfortunate at a time when there are signs of renewed international interest in the concept.

It is accordingly submitted that the action *in rem* against the associated ship is a mode of procedure to enforce maritime claims. It impleads the owner of the associated ship for the reasons already advanced in considering the nature of the action *in rem* against the ship concerned. As with that action arrest is an essential component of the action either by way of an actual arrest or by way of a deemed arrest under section 3(10)(a) of the Act. Once such an arrest has taken place a statutory lien attaches to the vessel so that the action can be continued to its conclusion and the vessel sold to satisfy any judgment notwithstanding a sale to a third party after the arrest. If the owner is personally liable for the debt as in the case of a sister ship arrest then the rule in *The Dictator* applies and the owner’s personal liability will be established in those proceedings if the owner enters appearance to defend, without challenging the jurisdiction of the court, or otherwise submits to the jurisdiction. If the owner is not personally liable, which will be the case in any instance of a true associated ship, or there is no appearance to defend irrespective of personal liability, then the claimant can only recover up to the value of the vessel

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<sup>77</sup> Bradfield G, ‘Guilt by association in South African admiralty law’ [2005] 2 LCMLQ 234.

and no more. Third parties having an interest in the associated ship may enter an appearance to defend and defend the action without incurring any personal liability save that in respect of costs.

For the obvious and basic reason that one cannot regard the action against the associated ship as involving the same parties as the parties to the original maritime claim there can be no suggestion that the effect of a judgment against an associated ship is to bring about a merger of the original claim in the judgment. In principle therefore there is no reason why an action *in rem* against an associated ship should not be followed by an action *in personam* against the party personally liable on the claim or vice versa. It is also submitted that the fact of judgment against one of a number of associated ships should not affect the entitlement to pursue either the ship concerned or another associated ship. If there are constraints in that regard, which for the reasons set out in chapter 8 it is submitted there are not, they must be found elsewhere than in the characteristics of the action against the associated ship.

It will be sent therefore that the action *in rem* against an associated ship in general has the same characteristics as an action against the ship concerned. The differences relate to the scope of the owner's personal liability and to the consequences of a judgment on the underlying claim, but these are relatively small. Fundamentally the owner of the associated ship is in the same position as would be the owner of the ship concerned had that vessel been arrested in an action *in rem*. Greater differences emerge if one examines the notion inherent in the comment by Milne JP quoted above that the associated ship and its owner stand in all respects in the shoes of the ship concerned and its owner. These important issues have not been explored in the cases but have arisen in practice and it is to them that we now turn.

## CHAPTER 13

### **THE ASSOCIATED SHIP – PROBLEMS AND PUZZLES**

Although the associated ship has now existed for a quarter of a century and has been the subject of many arrests and many actions there remain a number of questions that have not yet been addressed or resolved. Some have arisen in practice and others perhaps not. No consideration of the associated ship would however be complete without some attempt to address those questions and to suggest the possible solutions to them. Five suggest themselves as requiring consideration and two of those can be dealt with together. The five are (1) the effect of an arbitration clause in the underlying agreement, usually a bill of lading or charterparty; and the ability of the owner of the associated ship to rely upon such clause; (2) the effect of a clause providing that disputes are to be referred to the exclusive jurisdiction of a foreign court; (3) the ability of the owner of the associated ship to rely upon the doctrine of *forum non conveniens* as embodied in section 7(1)(a) of the Act; (4) whether and, if so, on what basis the owner of the associated ship can rely upon tonnage limitation to limit the amount of the claim and (5) what impact a judgment against the associated ship has on a maritime lien over the ship concerned. The first two can be considered together.

#### 1 **ARBITRATION AND EXCLUSIVE JURISDICTION CLAUSES**

Many agreements in the maritime field, particularly charterparties and bills of lading, contain clauses that either refer disputes in terms of the agreement to arbitration or provide that it shall be subject to the exclusive jurisdiction of a particular court. The general enforceability of such clauses is specifically recognised in the Act in section 7(1) which provides that:

‘(a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.

(b) A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed..’

There is no doubt that these provisions are aimed at arbitration clauses and exclusive jurisdiction clauses. Both have been held to apply to foreign jurisdiction clauses. An English choice of law and jurisdiction was dealt with under section 7(1)(a)<sup>1</sup> and a Greek one under section 7(1)(b) on the basis that whilst it refers only to arbitration clauses an exclusive jurisdiction clause is taken as constituting ‘any other sufficient reason’ for the purposes of the section.<sup>2</sup> Where a party establishes the existence of such a clause covering the matters in dispute it is for the other party to show good cause why effect should not be given to the agreement.<sup>3</sup>

Where a maritime claimant is happy to give effect to an arbitration clause or exclusive jurisdiction clause there is no difficulty or need to commence an action *in rem* in South Africa because of the availability of the security arrest in terms of section 5(3) of the Act. If security is not available and a reasonable need for such security can be demonstrated then the associated ship can be arrested for that purpose alone. The problem arises where the claimant does not wish to give effect to such provision for whatever reason as may be the case where the claimant fears that proceedings will be unduly delayed in the chosen forum or where the identity of the tribunal gives rise to concerns that it may have a bias, actual or unconscious, towards the defendant. In those circumstances the claimant may choose to invoke the jurisdiction of a South African court and cause an associated ship to be arrested with a view to resisting any attempt to stay the proceedings in terms of the arbitration or exclusive jurisdiction clause.

The problem that this raises is that the owner of the associated ship is not a party to the arbitration agreement or choice of a foreign court as the one to have exclusive jurisdiction over any dispute arising from the contract. On what basis then can it claim to have the proceedings

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<sup>1</sup> *MV Spartan Runner v Jotun-Henry Clark Limited* 1991 (3) SA 803 (N).

<sup>2</sup> *MV Achilleus v Thai United Insurance Company Limited* 1992 (1) SA 324 (N) at 327.

<sup>3</sup> *MV Spartan Runner* at p 806; *MV Achilleus* at p 334.



stayed or ask the court in this country to decline to exercise its undoubted jurisdiction? If it refers the dispute to arbitration the arbitrator may properly say that it is not a party to the arbitration agreement. As it is the defendant it has no interest in the commencement of court proceedings in another jurisdiction and it would be entitled to resist such proceedings on the footing that it bore no liability for the claim save that imposed in South Africa by virtue of the associated ship jurisdiction in this country.

As noted in discussing the case of *The Berg* at an earlier stage<sup>4</sup> this issue was raised in the course of argument and dismissed out of hand as being dependent on the result of a case distinguishable on its facts. However, whilst the distinction existed it was not a distinction in regard to the principle at present under consideration and it is pertinent to the proper resolution of that problem. The case involved a claim by cargo interests for damage to cargo carried on board a vessel. Three parties were cited. Two were the parties said (in the alternative) to be the carriers of the cargo under the bill of lading. The third was the agent of the carrier cited in terms of the then provisions of section 311(4) – now repealed - of the Merchant Shipping Act 57 of 1951. The bill of lading contained an arbitration clause and the agent brought proceedings under the Arbitration Act 42 of 1965 to have the action stayed pending an arbitration to resolve the question of liability on the claim. That claim was rejected on the basis that the agent was not a party to the arbitration agreement, being neither an immediate party nor the representative of such a party within the meaning of that expression in the definition of ‘party’ in section 1 of the Arbitration Act and only a party was entitled under that Act to seek a stay for the purposes of enforcing an arbitration agreement.

The case is relevant because it identifies the basic problem facing the owner of an associated ship in seeking a stay of an action *in rem* properly instituted in South Africa by way of the arrest of an associated ship. Such owner is not a party to the arbitration agreement (or the contract embodying the exclusive jurisdiction clause) and the problem it faces is therefore that its situation is not encompassed by the language of section 7(1)(b), because it has not been

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<sup>4</sup> Chapter 5, *supra*.

agreed ‘by the parties concerned’ that they will submit their dispute to arbitration or to determination by another court. Section 7(1)(a) is also unhelpful because it is a necessary element of a claim for relief under that clause that the court is satisfied that ‘any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings’. That requirement cannot be satisfied because no other court or tribunal will exercise jurisdiction in respect of the claim against the associated ship or its owner and the effect of the judgments in *The Berg* is that such proceedings are separate and distinct from proceedings *in rem* against the ship concerned and *a fortiori* distinct from proceedings *in personam* against the owner or charterer of the ship concerned.

This seems to be a less than satisfactory situation. There is authority in England that an insurer acting under rights of subrogation or that has taken an assignment of the insured’s claim stands in the shoes of the insured insofar as the obligation to submit to arbitration is concerned<sup>5</sup> but this appears to be by virtue of a statutory provision equivalent to the definition of ‘party’ in the South African Arbitration Act and is therefore of little assistance in the situation under consideration. However, there seems to be no escape from the conclusion, however unsatisfactory, that by bringing an action *in rem* against an associated ship a claimant can defeat the provisions of both an arbitration clause and an exclusive jurisdiction clause in the contract underlying the claim.

## 2 **FORUM NON CONVENIENS**

The purpose of section 7(1)(a) of the Act is to introduce in South Africa<sup>6</sup> the doctrine of

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<sup>5</sup> *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd’s Rep 279 (CA) at 286; *Hatzl v XL Insurance Co Ltd* [2009] 3 All ER 617 (CA), paras [66] to [69].

<sup>6</sup> Where the availability of the principle is debatable, see *Liberty Life Association of Africa v Kachelhoffer* 2001 (3) SA 1094 (C) at 1109H-1110B. Several cases have recognized that this is the effect of section 7(1)(a). *Katagum Wholesale Commodities Company Limited v The mv ‘Paz’* 1984 (3) SA 261 (N) at 266H; *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D) at 334H; *Great River Shipping Inc v Sunnyface Marine Limited* 1992 (4) SA 313 (C) at 316C-E; *Weissglass N.O. v Savonnerie Establishment* 1992 (3) SA 928 (A) at 939C; *MT Tigr: Bouygues Offshore SA and Another v Owners of the MT Tigr and Another* 1998 (4) SA 740 (C) at 741.

*forum non conveniens* that has its origins in Scottish principles<sup>7</sup> and has been adopted in England.<sup>8</sup> The question is not one of convenience but the appropriateness of the court exercising its jurisdiction in an action or declining to do so on the basis that the case may more appropriately be determined by another court or tribunal. Our courts have adopted the English approach that the party seeking the stay must show that there is another available forum competent to exercise jurisdiction that should more appropriately determine the dispute.

It is here at the threshold issue that the problem arises for the owner of the associated ship. How do they establish that there is another court or tribunal having jurisdiction to hear the claim if the claim is one that lies as a separate claim against the associated ship and its owner and not against the ship concerned and its owner? But this is the effect of the decision in *The Berg* that the action against the associated ship is separate and distinct from the action against the ship concerned. That being so it would not be feasible for the owner of the associated ship to show that there is another forum that would exercise jurisdiction in respect of the claim against the associated ship. Unless it can be said that the claim against the associated ship is in some way to be identified with the claim against the ship concerned there is no claim in the sense of a claim by A against B that is cognisable by any tribunal other than the court in South Africa seized of the action *in rem* against the associated ship. It appears therefore that the owner of an associated ship cannot invoke the doctrine of *forum non conveniens* to persuade a South African court not to exercise its jurisdiction in an action *in rem* against an associated ship.

As with arbitration clauses and exclusive jurisdiction clauses this is an unsatisfactory conclusion because it not only compels a South African court to deal with a matter that should more appropriately be dealt with by another forum elsewhere, but it enables the maritime claimant to circumvent the rights of the other party by invoking the associated ship jurisdiction. It would not seem to be a way of overcoming the problem for the owner of the associated ship,

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<sup>7</sup> *Société du Gaz de Paris v Société Anonyme de Navigation des Armateurs Français* 1926 SLT 33; 1926 SC (HL) 13 at 21.

<sup>8</sup> *Spiliada Maritime Corp v Cansulex Ltd; The Spiliada* [1986] 3 All ER 843 (HL).

with the co-operation of the owner of the ship concerned, to procure that the latter consent to the relevant foreign jurisdiction and offer appropriate security for the claim in that jurisdiction. If that offer is not accepted the dilemma remains that the action before the court is one *in rem* against the associated ship and nothing more. Perhaps fortunately the issue is not one that so far as I am aware has ever been raised or given rise to difficulties but it is an unfortunate by-product of the characterisation of the action against an associated ship as distinct from that against the ship concerned. Certainly in the three respects discussed it is not so that the owner of the associated ship is in the same position as the owner of the ship concerned.

### 3 **TONNAGE LIMITATION**

Section 261 of the Merchant Shipping Act 57 of 1951 contains the statutory provisions governing the question of tonnage limitation in South Africa. The relevant portion of the section reads as follows:

- 1) The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity—
  - (a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage; or
  - (b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage; or
  - (c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage: ...
- (2) The provisions of this section shall extend and apply to the owners, builders or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of this Act.
- (3) The provisions of this section shall apply in respect of claims for damages in respect of loss of life, personal injury and loss of or damage to property or rights arising on any single occasion, and in the application of the said provisions claims for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined.'

The section has only twice been considered by our courts and then not in any respect relevant for present purposes.<sup>9</sup> However questions of limitation have arisen on a number of occasions in part because of South Africa's continued adherence to the 1957 Limitation of Liability Convention<sup>10</sup> under which the ability to break limitation is substantially easier than under the 1976 Limitation of Liability Convention.<sup>11</sup> Thus the issues of the appropriate jurisdiction in which to hear the claims arising from the stranding of *The Bos 400* revolved in large measure around the question of the appropriate limitation regime and the recognition of limitation decrees obtained in another jurisdiction.<sup>12</sup> The particular issues raised by associated ship arrest have been the subject of consideration and advice but thus far have not been put to the test in litigation.

The immediate questions that arise in the context of the associated ship are firstly whether the owner of the associated ship can rely upon limitation at all and secondly, if it can, on what basis is limitation to be determined and a limitation fund established. Hardly surprisingly the wording of the sections is not attuned to providing easy answers to these problems. It is couched on the basis that the owner of the vessel will also be the person liable in respect of the claim. If one takes the words literally the owner of the associated ship can always say that the damage in issue was not caused by its actual fault or privity and would always be entitled to limit liability. However that would be an anomalous situation and the anomaly would be compounded by the fact that in that event the limitation figure would be calculated on the basis of the tonnage of the associated ship and not on the basis of the tonnage of the ship concerned. Thus the situation could arise where loss of life is occasioned by the wilfully reckless misconduct of the owner of the vessel in sending an unseaworthy vessel to sea resulting in the vessel concerned being lost in the incident. That might well leave the dependents of the crew in the position where the arrest of an associated ship would be their only means of pursuing claims for damages. However, because they arrested an associated ship their claims would be subject to limitation, which would not be

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<sup>9</sup> *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 (4) SA 865 (C); *Nagos Shipping Ltd v Owners, Cargo lately laden on board the MV Nagos, and another* 1996 (2) SA 261 (D).

<sup>10</sup> International Convention Relating to the Limitation of Liability of Owners of Sea-going Vessels, 1957.

<sup>11</sup> Convention on Limitation of Liability for Maritime Claims, London, 1976

<sup>12</sup> *Bouyges Offshore SA v Caspian Shipping* [1998] 2 Lloyd's Rep 461 (CA).

the case if they had pursued the ship concerned. That does not seem right nor in accordance with the purpose of limitation regimes.

The converse situation can also give rise to difficulties as where a vessel is lost while carrying cargo the value of which substantially exceeds the amount of any limitation fund. No question of breaking limitation arises in the circumstances of the loss so that the owners of the ship concerned can expect their liability to be limited. Can the cargo claimants (and their insurers) circumvent the calculation of the amount of the fund by arresting a much larger associated ship and then claiming that the owner of the associated ship can only invoke limitation on the basis of the tonnage of the associated ship thereby increasing the recoverable amount substantially?

Asking these questions leads one on to other potential areas for argument. Thus it is conceivable that it could be argued that no right of limitation can be invoked by the owner of the associated ship on the basis that properly construed the language of section 261 is only directed at an owner that is personally liable for the loss in question or whose vessel is subject to a maritime lien in favour of the claimants, which could be the case in a collision damage situation. However it was not the intention of the associated ship provisions to enable claimants to circumvent or avoid entirely an internationally recognised institution such as limitation. Indeed the Act specifically recognises this as a maritime claim.<sup>13</sup> An alternative argument that recognised limitation would be to say that it is a remedy personal to the owner of the vessel that is the subject of the action *in rem* and accordingly the right to limit is given to the owner of both the ship concerned and the associated ship, with each owner being entitled to establish a separate limitation fund, with claimants being entitled to pursue their claims against multiple funds until fully satisfied. However that creates a situation not contemplated by the associated ship jurisdiction of it being used to recover more than could be recovered from the owner of the ship concerned.

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<sup>13</sup> Sub-para (w) of the definition of 'maritime claim' in section 1(1) of the Act.

The range, scope and complexity of the issues potentially arising in trying to apply the statutory provisions in regard to limitation in the context of the associated ship are such as to deter all but the stout-hearted from venturing into the field and probably explains why it is – in conjunction with the fact that South Africa continues to apply a fault and privity regime that enhances the prospects of breaking limitation – that although a number of cases have arisen in which these issues have been raised there has thus far been no attempt to resolve any of them by way of litigation.<sup>14</sup> The suggestion that follows is accordingly at best tentative and possibly foolhardy. It is submitted that the only sensible way of marrying the concept of limitation to the associated ship jurisdiction is to treat limitation as a substantive defence available to a shipowner for the purpose of restricting their liability in respect of certain classes of claims. Accordingly it should be treated as a defence in the same way as a cargo claim can be resisted on the basis of the defences available under the Hague Rules<sup>15</sup> or statutory manifestations of those rules in different countries. Accordingly the owner of the associated ship does not acquire a separate and distinct right to invoke limitation on the basis that it is to be treated as an ‘owner’ under section 261, but acquires the right to limit derivatively on the basis of the entitlement of the owner of the ship concerned to limit its liability. That would mean that the amount of the limitation fund would be calculated on the basis of the tonnage of the ship concerned and the issue of breaking limitation would depend on whether the loss in question was occasioned by actual fault or privity on the part of the owner of the ship concerned.

That approach raises certain other questions, some of a procedural nature, that are of considerable importance. The first relates to the setting up of a limitation fund. Should that be set up in the name of the owner of the ship concerned or in the name of the owner of the associated ship or jointly by both of them? If it is set up in South Africa by the owner of the ship concerned does that amount to a submission to the jurisdiction for the purpose of *in personam* proceedings against that owner? This is more than academic. A judgment *in personam* may be a

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<sup>14</sup> In all fairness the issues surrounding the international application of limitation are so complex that there are relatively few cases dealing with the topic.

<sup>15</sup> Or once they obtain wider acceptance and application the Rotterdam Rules.

basis for claiming to recover from the hull insurer or the proceeds of the hull insurance and if those proceeds have been dissipated the possibility of a tracing remedy could be explored. Even if it gives no prospect of direct relief it may simplify proceedings by affording rights of discovery and inspection that might be resisted by the owner of the associated ship. Substantively will a limitation decree from a South African court be recognised in other jurisdictions? To answer these would require a far more detailed analysis of the law relating to limitation than is justified by the present work. It suffices for present purposes to identify in broad detail the general nature of the difficulties posed by the application of tonnage limitation in the context of the associated ship. The answer to the problems it poses will have to be worked out over time. A modest suggestion is that if the approach set out above is thought generally desirable it could without undue difficulty be imported into the present legislation by way of amendment.

#### 4 **DOES AN ASSOCIATED SHIP ACTION *IN REM* DISCHARGE A MARITIME LIEN?**

The link between the action *in rem* and the maritime lien is founded on the proposition that the lien is executed by way of the action *in rem*. Accordingly the effect of such an action against the ship burdened by the lien is to discharge the lien either because the claim is dismissed or because, after judgment is obtained the vessel is sold and it is well-established that such a judicial sale is one free of all liens and encumbrances.<sup>16</sup> There are other means of discharging a maritime lien<sup>17</sup> but they are not relevant for present purposes. The question is whether an action against an associated ship on a maritime claim giving rise to a maritime lien results in the discharge of the lien even though the result of the action is that the underlying claim is not fully paid.

Once again the question is not one that has been addressed. However, once it is accepted

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<sup>16</sup> It is so provided in section 9(3) of the Act.

<sup>17</sup> See Jackson, *op cit*, paras 18.91 to 18.119



that the claim against the associated ship is distinct from that against the ship concerned one must accept that the effect of arresting the associated ship is to give rise to a statutory lien over the associated ship. That has been held to be the case with a sister ship arrest in England<sup>18</sup> and there seems to be no reason why it should not apply equally to the true associated ship as with any other claim. After all claims giving rise to a maritime lien against the ship concerned are themselves maritime claims for the purpose of the Act and as already discussed the effect of the arrest of an associated ship in an action *in rem* is to give rise to a statutory lien.

The arrest of the associated ship does not operate to transfer the maritime lien itself to the associated ship. That has never been suggested to be the case and there is no warrant for it in the Act itself. Accordingly the maritime lien will continue to exist in relation to the ship concerned after the arrest of an associated ship. The question then is whether the lien is lost if the action succeeds and the associated ship is sold but the claimant does not succeed in recovering the full amount of its claim. The sale of the associated ship is one free of mortgages, liens and encumbrances, but that relates to mortgages, liens and encumbrances over the associated ship not over another vessel entirely. That much is clear from the fact that a sale under section 9 only relates to a vessel that has been arrested and accordingly the subsequent provisions of that section dealing with the consequences of a sale must be likewise construed as relating to the ship that was under arrest and has been sold.

Once again any answer to the question can only be advanced on a tentative basis. It is submitted that the answer is that the action against the associated ship does not affect the existence of the maritime lien over the ship concerned unless it results in the underlying claim being fully paid. This flows from the separate character of the associated ship claim and the absence of any provision of the Act that suggests an opposite conclusion. To arrest an associated ship in an action *in rem* is not a procedural means for suing the ship concerned in an action *in rem*. In other words the action is not to be construed as lying against the ship concerned. That being so it is difficult to see on what basis, absent specific statutory provision, it could be held

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<sup>18</sup> *The Leoborg (No 2)* [1964] 1 Lloyd's Rep 380.

that its effect is to discharge a lien over an entirely different vessel. That is reinforced by the character of the maritime lien itself as one arising in relation specifically to a particular vessel and adhering to it until discharged notwithstanding any change in ownership of that vessel. A similar view is expressed by Wiswall in regard to the sale of sister ships.<sup>19</sup> It is submitted that this is correct. One further implication is that this reinforces the position already espoused that the Act does not bar a claimant from arresting both the ship concerned and an associated ship. It would be slightly surreal to say that this was impermissible but that the maritime lien over the ship concerned was unaffected by the action against the associated ship.

## 5 **PEERING INTO THE CRYSTAL BALL – THE FUTURE OF THE ASSOCIATED SHIP.**

After twenty-six years it is time to take stock. The associated ship has undoubtedly been a popular and successful institution as far as maritime claimants are concerned. It has brought a substantial body of maritime work to South Africa and should continue to do so. It is perhaps surprising that something as novel has not generated more legal controversy. Some of the jurisprudence surrounding the institution has been controversial but perhaps because of the commonsense and restraint of practitioners it has created fewer problems than might otherwise have been expected. A major concern at present is a practical one of the reluctance of courts to address firmly the situation where improbable factual cases are advanced to resist an associated ship arrest and it is to be hoped that a change of stance will come about in the future. Otherwise it will be necessary to revisit the suggestion made by Friedman J in the early days of the Act that some kind of factual presumption should be incorporated in the Act to deal with this. It is not good for the reputation of South African courts to be seen to be too easily taken in by this type of tactic.

Apart from the practical day to day issues of arrest, security and the pursuit of claims there

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<sup>19</sup> F L Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* at 171. Jackson, *op cit*, para 18.14 mentions this without comment.

are unresolved questions concerning the associated ship that are likely at some stage to rear their heads. However, in general litigation concerning associated ships has primarily been about the fact of association rather than anything beyond that such as the questions explored in this and the preceding chapter. That illustrates that it is in large measure a practical innovation addressed to a specific situation that in day to day practice serves its intended purpose reasonably well. That is likely to mean that other jurisdictions will from time to time re-examine the South African model to see whether it can be of assistance in addressing the problem of unpaid claims in the world of maritime trade. Whether they will adopt some variant of the associated ship model is as discussed a matter of maritime policy having international implications that I have not sought to explore. For the present it is a unique contribution by South Africa to international maritime law that will continue to be useful for some considerable time.

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## **APPENDIX 1**

REPORT ON THE PROPOSED DRAFT ADMIRALTY COURTS JURISDICTION ACT.

1.

The draft Act (I hope I shall be excused for referring to it as a draft Act and not as a Bill and to the draft sections as sections and not clauses) which accompanies this report sets out to define the jurisdiction with regard to maritime matters of those Courts in the Republic which have boundaries on the coast. It is, however, necessary in defining the jurisdiction of those Courts to deal with certain other matters. The questions are not questions merely of jurisdiction but substantially of substantive law and also of procedures which are known at present only in the Admiralty Courts.

2.

Among the most important procedural matters is the preservation and extension of the present procedure in rem which exists in the Courts of Admiralty in the Republic which sit by virtue of the Colonial Courts of Admiralty Act. Experience shows that the procedure in rem is the most and frequently the only effective method of enforcing admiralty claims. It has greatly increased in importance certainly in the United States of America and, I believe, in the United Kingdom with the reduction, in some cases almost to the point of disappearance, of companies carrying on a regular, that is liner, service. In the present situation



the most frequent need in the Admiralty Court is to provide a remedy against the owner of a vessel which is the only asset of the company which owns it. Common law proceedings by way of attachment to found jurisdiction are frequently ineffectual to enforce the claimant's rights because many jurisdictions do not recognise a judgment founded on attachment. In those circumstances it seems to me to be essential to preserve and to bring up to date the provisions relating to proceedings in rem.

3.

In essence proceedings in rem appear to have had their origin in proceedings to enforce a so-called maritime lien. The word "lien" is not really appropriate to describe the nature of the rights which do not in any way depend on possession or on contract. Nevertheless I have thought it desirable to retain the expression "maritime lien" in the draft Act because it is one which is well known and appears in a large number of the international conventions to which I shall refer. I may mention with regard to the question of terminology that I have also thought it desirable to retain the word "Admiralty" to describe the Courts. The phrase "Maritime Court" which might be thought to be appropriate is already in existence in the Merchant Shipping Act to describe one form of a Marine Court of Enquiry. "Admiralty" is a commonly accepted

phrase to describe maritime jurisdiction (it appears in Article III, section 2 of the United States Constitution) so I have thought it desirable to retain it.

4.

As the Admiralty law is one with a large emphasis on international trade it appears to me to be desirable to try to recognise this aspect in the Act. This explains what may at first sight seem the rather strange provisions of section 8 (1). The description of the maritime law as "representing the law and customs of the sea generally prevailing among maritime States" is taken from the speech of Lord Watson, a Scottish lawyer, in Currie v. M'Knight 1897 A.C. 97, 103-4. It is, of course, clear that there is no such thing as a universal maritime law. Lord Denning's somewhat optimistic views on this aspect of the matter expressed in The Tojo Maru (1969) 3 All E.R. 1179, 1183 were not accepted in the speech of Lord Diplock in the same case in the House of Lords reported in (1971) 1 All E.R. 1110, 1133. There are, however, numerous international conventions on maritime law which in many instances represent an attempt to reconcile or harmonise the principles of the English Common Law and the continental systems based on the Civil Law.

5.

I turn now briefly to deal with certain sections

of the Act.

(a) Section 3 (2). The inclusion of the territorial waters is, I think, necessary because there is much to be said for the proposition that the boundary of the jurisdiction of the Divisions of the Supreme Court is the low water mark. The matter was to have been debated before the Appellate Division in an appeal from the decision of the Cape Provincial Division in *The Yorigami Maru* but the case was settled. It seems to me to be clear that this matter should be cleared up beyond doubt.

(b) Section 4.

(i) The section generally is based on two sources, namely the United Kingdom Administration of Justice Act, 1956 and the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952 which is itself the origin of much of the United Kingdom 1956 Act. The phrase "maritime claim" is used in the Convention and the United States Constitution, as I have mentioned, and the United States Judiciary Act, 1789 both use the phrase "admiralty and maritime jurisdiction". In some cases I have tried to clear up difficulties which have arisen in the construction

of the United Kingdom Act as, for instance, in paragraph (g) where the reference to the master or crew is based on the decision in The Escherheim (1974) 2 Lloyd's Law Reports 188, 194 and in paragraph (j) where there is a reference to claims for negligent salving which were held not to be admiralty claims in a later decision also relating to The Escherheim in (1976) 1 All E.R. 441. Paragraph (r) is included because it appears to me that marine insurance cases are maritime cases as they have been recognised in the United States ever since the decision in De Lovio v.Boit (1815) 7 Fed. Cas. 418.

- (ii) In actions in personam I have thought it desirable to preserve the rules with regard to attachments to found jurisdiction but to do away with the necessity that the plaintiff should be an incola, a requirement which has produced the practice of ceding claims to companies set up for the purpose only of receiving cession and enforcing claims chiefly maritime claims. As the peregrinus may be required to give security for costs it does not seem to me that any hardship is involved. As attachment in actions in

personam is itself a feature originally of admiralty actions and as I understand it still prevails in the United States I can see no need for doing away with the requirement.

- (c) Section 6 provides for actions in rem and in subsections (3) to (5) incorporates the provisions as to the so-called "sister ship" arrests and the limitations of the 1952 Convention to which I have referred. Section 4 (4) (c) incorporates the decision in the I Congreso (1977) 1 Lloyd's Law Reports 536, 561-2.
- (d) Section 7. I have thought it desirable to incorporate an express power for examination or testing. It is frequently the situation that the prompt examination of the vessel might tend clearly to establish either a claim or a defence. (I mention in this connection that it is, for instance, a defence to a claim generally with regard to carriage of goods that there has been negligence in the navigation of the ship. Negligence of this nature as opposed to negligence in the management of the cargo can frequently be established by prompt examination but the evidence may disappear or may be suggested to be fabricated if examination is not obtained immediately).
- (e) Section 8. I have endeavoured in subsections (1)

and (2) to outline what I believe to be the object of the Admiralty Court and the law to be administered by it. Subsection (3) makes written evidence generally admissible but I contemplate that the rules which are at present in the course of preparation will produce the situation that a plaintiff or defendant will not be placed in an unduly favourable position particularly with regard to claims of a moderate size by the consideration that the other side may be placed in the position of incurring the expense, sometimes very substantial, of obtaining evidence on commission with regard to matters which are not really in dispute.

- (f) Section 9. The object of this section is to prevent actions, whether on maritime claims or other actions, being held up in those cases which I think will be of infrequent occurrence where there is a dispute as to whether the claim is a maritime claim or not. It is for this reason that I have suggested the provision that there should be no appeal on a matter of this nature.
- (g) Section 10. The object is to provide that a common law attachment does not prevent attachment in admiralty and that a ship (but not cargo or freight) which has been attached at common law shall nevertheless be applied in satisfaction of the claims of

creditors in accordance with the rules set out in this Act.

- (h) Section 12. The exclusion of an attached ship from the assets in insolvency or liquidation may at first sight seem very drastic. Nevertheless the problem of the priorities of maritime liens so as to fit into the order of priorities in the Insolvency Act seems to me to be insuperable. It will be observed that the provisions apply only where the ship has already been attached or arrested, that is where proceedings have started. In these circumstances it seems to me that the most appropriate method of dealing with this matter is as suggested in section 12.
- (i) Section 13. Priorities. The priorities set out are, in effect, taken from two International Conventions relating to maritime liens and mortgages, namely that of 1926 and that of 1967. In dealing with priorities and maritime liens I have also, in some respects, followed the provisions of Book 8, Title 3, Chapter 3 of the "Ontwerp Voor Een Nieuw Burgerlijk Wetboek" of the Netherlands published in 1972 which deals with preferences and distribution of proceeds. As I have mentioned, I have endeavoured in section 13 (3) to give some definition of maritime liens.

- (j) Section 14. This makes provision for rules and in subsection (4) for a substantial use of reference to arbitration.

6.

I believe that a clarification and modernisation of the rules relating to admiralty procedure and of the ranking of claims is a matter of some urgency. As I mentioned at a previous meeting of the South African Law Commission which I attended I believe that it is desirable that a complete code of the law relating to maritime matters should be enacted. Obviously, however, the preparation of such a code is a matter which will take a very considerable time. In the circumstances I trust that the present Act will serve to deal with matters pending the enactment of a complete code and that when that code is enacted it will be possible to try to rectify such of the defects which I am regretfully sure must exist in the present Act as may have come to light by then.



ACT TO CONSTITUTE AND DECLARE THE JURISDICTION OF  
THE ADMIRALTY COURTS OF THE REPUBLIC OF SOUTH AFRICA.

- Short Title.                    1.    This Act shall be called the Admiralty Courts Jurisdiction Act 1980.
- Definitions.                   2.    In this Act, unless a different meaning appears from the context:
- (i)   "Admiralty proceedings" shall mean proceedings in an Admiralty Court.
- (ii)   "maritime lien" means a lien referred to in section 13 (3).
- (iii)   "ship" means any vessel used in navigation.
- Admiralty Courts.            3.    (1)   The following Divisions of the Supreme Court of South Africa shall be Admiralty Courts.
- (1)   The Cape of Good Hope Provincial Division.
- (2)   The Eastern Cape Division.
- (3)   The Natal Provincial Division.
- (4)   The Durban and Coast Local Division.
- (5)   The South Eastern Cape Local Division.
- (2)   For the purposes of this Act the jurisdiction of each of the said divisions shall be deemed to include the territorial waters of the Republic of South Africa as defined in the Territorial Waters Act, No. 87 of 1963, bordering the said Division.
- Jurisdiction in                4.    (1)   Each Admiralty Court shall have jurisdiction in respect of all maritime claims which, without limiting the generality of the foregoing, shall include the following:
- (a)   Any claim relating to the title, ownership or possession of a ship.
- (b)   Any claim to the ownership of any

share in a ship and any dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship.

- (c) Any claim in respect of a mortgage, hypothecation, charge, right of retention or pledge of any ship.
- (d) Any claim for damage caused by a ship whether by collision or otherwise.
- (e) Any claim for damage done to a ship.
- (f) Any claim for loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the operation of any ship which shall include the navigation or management of the ship and the loading, carriage, or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship.
- (g) Any claim for loss of or damage to goods (including baggage and the personal belongings of the master or crew of any ship) carried or which ought to have been carried in a ship.
- (h) Any claim arising out of any agreement for or relating to the carriage of goods in a ship.
- (i) Any claim relating to any charter party or to the use or hire of a ship.
- (j) Any claim for or in the nature of salvage including any claim relating to the sharing or apportionment of salvage and any claim by any person having any right with regard to any property salvaged or which would, but for the negligence of any salvor or would-be salvor, have been salvaged, against any

salvor/.....

salvor or would-be salvor for loss caused by the negligence or default of the salvor or would-be salvor in the salvage operation.

- (k) Any claim in the nature of towage or pilotage.
- (l) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance.
- (m) Any claim in respect of the construction, repair or equipment of any ship or any dock charges or dues or harbour charges or dues or any similar charges or dues.
- (n) Any claim by a master or member of the crew for wages and any other payment due to him by reason of his being the master or member of the crew.
- (o) Any claim by a master, shipper, charterer or agent in respect of payments or disbursements made for or on behalf of a ship or on account of a ship or her owner.
- (p) Any claim relating to general average or arising out of any act claimed to be a general average act.
- (q) Any claim arising out of bottomry or any respondentia bond.
- (r) Any claim relating to marine insurance or any policy of marine insurance.
- (s) Any claim with regard to the forfeiture of any ship or any goods carried therein or for the restoration of any ship or goods from any forfeiture.
- (t) Proceedings for the limitation of the liability of the owner of the ship in terms of section 261 of the Merchant Shipping Act, No. 57 of 1951, or of any other person

entitled/.....

entitled to any similar limitation of liability.

- (u) Proceedings with regard to any claim to or the distribution of any fund or any portion of any fund paid into or held by the Admiralty Court or any of its officers.
- (v) Any claim relating to any maritime lien whether or not the same falls within any of the preceding paragraphs.

Actions in personam.

- 5. (1) Any maritime claim may be enforced by an action in personam.
- (2) An Admiralty Court shall have jurisdiction in respect of actions in personam against:-
  - (a) any person resident or carrying on business at any place in the Republic of South Africa;
  - (b) any other person whose property has been attached to found jurisdiction in the action.
- (3) The rules with regard to attachment to found jurisdiction of any Division of the Supreme Court shall apply to any such attachment save that it shall not be necessary that the person attaching any such property shall be an incola either of the area of jurisdiction of the Court or of the Republic of South Africa.

Actions in rem.

- 6. (1) A maritime claim may also be enforced by an action in rem brought either solely as an action in rem or together with any action in personam.
- (2) An action in rem shall be instituted by the arrest of the ship or its cargo or freight against or in respect of which the claim lies or of any one or more of them.
- (3) An action in rem may be brought by the arrest not only of the particular ship

in/.....

in respect of which the maritime claim arose but also against any other ship which is owned by the person who was at the time when the maritime claim arose the owner of the particular ship.

- (4) (a) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.
- (b) A person having beneficial ownership of a ship or a share in a ship shall be deemed to be the owner of such ship or share notwithstanding that he is not registered as the owner.
- (c) "Owner" shall not include a charterer who has taken the ship on a charter by demise.
- (5) A ship shall not be arrested nor shall any bail or other security be given more than once in respect of the same maritime claim by the same claimant.
- (6) (a) Any ship, cargo or freight shall be deemed to have been arrested and to be under arrest if at any time whether before or after arrest bail has been given to prevent the arrest of the ship, cargo or freight or to obtain the release thereof from arrest.
- (b) The said bail shall for the purposes of sections 10 and 11 be deemed to be the freight or the proceeds of the sale of the ship or cargo.

Examinations.

- 7. (1) The Admiralty Court may at any time grant an order for the examination, testing or investigation by any person of any ship, cargo, documents or any property or thing of any nature whatsoever if it appears to the Court that any such inspection or investigation is necessary or desirable for the purpose of establishing or investigating any maritime claim which may be or may

have/.....

have been brought or any defence thereto.

- (2) In making any such order the Court may order that any record, notes or recording whether then in existence or not be transcribed or translated and shall make such order as to the conditions subject to which any such examination, test or investigation shall be made and as to the costs and expenses of any such examination, test or investigation or any other step taken under this section as to the Court seems just.

- Law and practice.      8.    (1) The Admiralty Court shall take cognisance of and apply the maritime law representing the law and customs of the sea generally prevailing among maritime States and may, in considering any maritime claim, take account of the laws and decisions of any such States and of any international convention notwithstanding that the Republic of South Africa may not be a party to the same.
- (2) The object of the Admiralty Court shall be to dispose expeditiously and in accordance with law of matters coming before it and to that end a judge of the Admiralty Court may give such directions for the disposing of any matter as to him may seem just notwithstanding that any such directions relate to matters not provided for by this Act or the rules or are contrary to any provisions of the rules.
  - (3) Notwithstanding any other provision of any other law, evidence of statements which would otherwise be inadmissible as being hearsay, evidence in writing and on affidavit shall, subject to any directions given in terms of this Act or the rules, be admissible in the Admiralty Court but the weight to be attached to any such evidence shall be a matter for the decision of the judge.
  - (4) The Admiralty Court may permit the joinder in any admiralty proceedings of any person from whom any party to

the/.....

the admiralty proceedings is entitled to claim a contribution or indemnification or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and should properly be determined in such a manner as to bind the person to be joined notwithstanding that the claim against the person to be joined is not a maritime claim or that such person is not otherwise amenable to the jurisdiction of the Admiralty Court whether by reason of the absence of any attachment of his property or otherwise.

- (5) The Admiralty Court may grant any relief which can be granted by any Division of the Supreme Court of South Africa and in particular may grant an order for rectification of any contract or specific performance and may make such order as to interest and the rate of interest on any sum awarded by it and as to the date from which such interest is to run whether it be before or after the date of the commencement of the action or the making of the order as to it seems just.

Disputes as to jurisdiction.

9. (1) If any question arises before any Court as to whether a matter proceeding or pending before it is one relating to a maritime claim the Court shall forthwith decide that question.
- (2) If the Court decides that the matter is a maritime claim:
- (a) if the matter is proceeding or pending before a Court other than the Admiralty Court the Court shall order that the matter be transferred to the Admiralty Court where it shall proceed as a maritime claim instituted by an action in personam and any property attached to found jurisdiction shall be deemed to have been attached under section 3 (2) (b);

(b)/.....

- (b) if the matter is one proceeding or pending before the Admiralty Court it shall continue before the Admiralty Court.
- (3) If the Court decides that the matter is not a maritime claim:-
  - (a) If the matter is one pending or proceeding before the Admiralty Court the Court shall order that it be transferred for hearing to the Division of the Supreme Court which would otherwise have jurisdiction in respect of the action: provided that if the action is one in personam in which jurisdiction is conferred by section 3 (3) by an attachment by a person other than an incola the Court may order the action to proceed as if the property had been attached by an incola or may make such other order, including an order dismissing the action for want of jurisdiction, as to it appears just.
  - (b) If the action is pending or proceeding before a Court other than the Admiralty Court the action shall continue before the said Court but without affecting any other objection to the jurisdiction of the said Court.
- (4)
  - (a) No appeal shall lie against any order made under this section.
  - (b) Any claim heard and decided as a maritime claim shall be deemed for all purposes to be a maritime claim.
  - (c) No appeal against any order or the consequences of any order shall lie on the ground that the claim was not a maritime claim.
- (5) No appeal shall lie against any order of the Admiralty Court save a final judgment or order of the Court which shall be deemed for the purposes of an appeal to be a judgment or order given on appeal by the Court of a Provincial

or/.....



or Local Division of the Supreme Court in civil proceedings.

Arrests and attachments.

10. (1) Where any ship, cargo or freight has been attached to found jurisdiction at common law it may nevertheless be attached or arrested in connection with a maritime claim.
- (2) Where any ship has been attached sections 11, 12 and 13 hereof shall apply whether or not the ship has been attached or arrested in an admiralty action as if the ship had been arrested in an action in rem.

Sale of ship attached or arrested.

11. Where a ship has been attached or arrested in an admiralty action it may at any time be ordered by the Admiralty Court to be sold and the proceeds thereof held as a fund in the Admiralty Court.

Application of bail or security.

12. Any ship attached or arrested or any bail or security given in respect of any ship or the proceeds of any ship sold in execution or in terms of any order of the Admiralty Court shall not vest in any trustee in insolvency nor form part of the assets to be administered by any liquidator of the owner of the ship or of any other person who might otherwise be entitled to such ship, bail or proceeds.

Ranking of claims.

13. (1) The claims with regard to any fund in the Admiralty Court or any bail or security given in respect of any ship, cargo, freight or other property in connection with any maritime claim or the proceeds of any property sold pursuant to any order or in execution of any judgment of the Admiralty Court shall be paid in the following order.
- (a) Costs and expenses incurred in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale.
- (b) Wages and other sums due to the

master/.....

master, officers and other members of the ship's complement in respect of their employment on the ship.

- (c) Port, canal and other waterway dues and pilotage dues.
- (d) Claims against the owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel.
- (e) Claims against the owner based on delict and not capable of being based on contract in respect of loss of or damage to property occurring whether on land or on water in direct connection with the operation of the vessel.
- (f) Claims for salvage, wreck removal and contribution in general average.
- (g) Mortgages, hypothecations, rights of retention and other charges upon the vessel duly effected in accordance with the law of the flag of the vessel and registered in a public register either at the port of the vessel's registry or at a central office.
- (h) Claims against the owner not falling under paragraph (e) in respect of loss of or damage to property occurring whether on land or on water in direct connection with the operation of the vessel.
- (i) Claims arising from contracts entered into or acts done by the master acting within the scope of his authority away from the vessel's home port where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage whether the master is or is not at the same time owner of the vessel and whether the claim is his own or that of ship

chandlers/.....

chandlers, repairers, lenders or other contractual creditors.

- (j) All other claims in the order of preference provided by the law relating to insolvency.
- (2) The Court shall have power on application by any interested person to determine how any claims against any proceeds shall rank and to make such order as to the Court may appear just and in making any such order:
  - (a) the Court shall take into account:-
    - (i) whether any claim is a maritime claim or any other claim;
    - (ii) when liability for any claim was incurred in relation to the incurring of liability for any other claim;
    - (iii) during what voyage or during what period or season the liability for the claim was incurred;
    - (iv) any matter which to the Court appears relevant for the purpose of arriving at a just and appropriate distribution of the proceeds.
  - (b) The Court may vary the order of priorities set forth in subsection (1).
- (3) The claims referred to in paragraphs (a) to (f) inclusive and (h) and (i) in subsection (1) shall give rise to maritime liens which shall:-
  - (a) confer a preferent right on the holder over the ship;
  - (b) in the case of the claims referred to in the said paragraphs (h) and (i) further confer a preferent right on the holder on the freight for the voyage during which the claim

for/.....

for the lien arose, and on the accessories of the ship and freight accrued since the commencement of the voyage during which the vessel was arrested;

- (c) entitle the holder to the rights conferred by the lien against any owner of the ship, notwithstanding that the lien arose before the owner against whom the rights are sought to be enforced became owner after the lien arose and without notice of the lien;
  - (d) be terminated by a sale of the property in respect of which the lien is held in terms of an order of an Admiralty Court or any other Court having jurisdiction in respect of the relevant maritime claim.
- (4) Any person who has at any time paid any claim or any part thereof which if not paid would rank under subsection (1) shall be entitled to all rights, priorities, privileges, preferences and liens to which the person paid would have been entitled if the claim had not been paid.

Rules of  
Court.

14. (1) The Judges President of the Cape Provincial Division, the Eastern Cape Division and the Natal Provincial Division shall have power to prescribe by rule all matters relating to the practice and procedure of the Admiralty Court including:
- (a) forms of process, writs and other documents either to be observed or to serve as a guide;
  - (b) the appointment and functions of officers;
  - (c) fees and costs;
  - (d) any matter which they are of the opinion is necessary or desirable with regard to the carrying out of

the/....

the functions of the Court.

- (2) The Judge President of any Division within the area of jurisdiction of which any Admiralty Court falls may prescribe by general rules relating to that Court or those Courts only any matter not provided for by the general rules referred to in subsection (1).
  - (3) The registrar of each Admiralty Court shall cause a copy of any general rules made under subsection (1) or under subsection (2) relating to the Division of which he is registrar to be kept available for inspection by any member of the public at any time during office hours.
  - (4) Any such rules may make provision for the reference of any one or more matters arising in connection with any admiralty proceedings to arbitration or report by any referee and for the appointment, remuneration and powers of any such arbitrator or referee (which powers may in addition to or in substitution for any powers provided in any such rules be such powers as may be conferred on the arbitrator or referee by any order of Court) and for the effect of any award of any arbitrator or any report of any referee.
- 
- (1) The Colonial Courts of Admiralty Act 1890 (53 and 54 Vict. Cap. 27) of the United Kingdom and the Admiralty Jurisdiction Regulation Act 1972 (Act No. 5 of 1972) are hereby repealed.
  - (2) Any proceedings instituted in the Court of Admiralty in terms of the Colonial Courts of Admiralty Act and not completed at the date of the commencement of this Act shall be deemed to be proceedings of the like nature under this Act, and shall continue accordingly.

## **APPENDIX 2**

A PROPOSAL FOR  
AN  
ADMIRALTY COURTS JURISDICTION  
ACT

EXPLANATORY MEMORANDUM

## THE PRESENT STATE OF THE LAW.

There are at present two sources of the Admiralty Law in South Africa. The first is the Roman Dutch Law, the second The Colonial Courts of Admiralty Act 1890 in terms of which the Supreme Court of South Africa administers the English Law of Admiralty as it stood in the year 1890. Until its repeal in 1977 Act No. 8 of 1879 of the Colony of the Cape of Good Hope provided for yet a further system, namely the Admiralty Law of England as it stood in the year 1879.

Theoretically apart from Statute Law the Admiralty Law under the three systems should be similar. It is recognised that the Admiralty Law is derived from the general customs of the Law of Maritime Nations. These are said to represent the general law of the sea and to follow a tradition embodied in early times in the Lex Rhodia and later in the Laws of Oléron, the Laws of Wisby, the Hanseatic Laws and various other laws, most of which are referred to in Benedict on Admiralty, Seventh Edition, Volume 1, pp. 1-7 to 1-30. There can be no doubt that the Civil Law played a very important part in the development of the Admiralty Law and it is certainly regarded in England, America and Scotland as being a system different from the Common Law of those countries. Gilmore and Black, Law of Admiralty, Second



Edition, 8. Bell's Commentaries on the Law of Scotland, Seventh Edition, 3.1.4. Currie v. M'Knight (1897) A.C. 97, 101-2.

I have given this brief introduction to indicate that the principles which have been evolved are legitimately described as they are in clause 8 (1) (a) as "the law and customs of the sea generally prevailing among maritime states".

#### THE EXISTING PROBLEM AND THE PROPOSED SOLUTION.

Although there ought theoretically to be little difference in the administration of the admiralty and other law in South Africa which has the Roman Dutch Law as its common law nevertheless this is not in fact the case. The Admiralty Law recognises as a basis for the exercise of jurisdiction the action in rem. Whatever the theoretical basis for this action which has been much discussed in American legal literature (for instance in 77 Harvard Law Review 1122 "Personification of Vessels") there is no doubt that it is an effective and valuable remedy. This is the view advanced in an article entitled "Maritime Liens: An American View" by Richard E. Burke published in Lloyd's Maritime & Commercial Law Quarterly, May, 1978, p.269. Its object is not only to proceed against the

res concerned but also for "indirectly, if not directly, impleading the owner of the property to answer to the judgment of the court to the extent of his interest in the property". The Parlement Belge (1880) 5 P.D. 197. It is a procedure which gives rise to the enforcement of maritime liens which have an order of priority and a nature frequently very different from the preferences recognised as arising under common law rights of retention, hypothecs and the like.

The first problem is therefore whether to retain the action in rem or to abandon the procedure and rely only on common law arrests to found jurisdiction. It seems to me that the latter course would be unwise. After considerable discussions and differences of opinion some degree of international agreement has been reached with regard to the ranking and enforcement of maritime liens. Owners of foreign vessels would, therefore, generally speaking, be in favour of the internationally recognised system. Further, the fact that enforcement by arrest is internationally recognised gives rise to the result that the judgments and effect of arrests are also, generally speaking, internationally recognised. A judgment based on an arrest to found jurisdiction is, however, generally speaking, not inter-

nationally enforceable.

I have, therefore, drafted the Act on the basis that the action in rem is to be retained. I have proceeded on the basis of endeavouring to identify what are generally regarded as the proper subjects of maritime jurisdiction, have made provision for procedure, the solution of conflicts of jurisdiction in the South African courts and the priority of claims. In the remainder of this memorandum I propose to deal with the draft Act clause by clause and indicate the source of the proposals if they are derived from elsewhere or the object which I have set out to try to achieve where they are not derived from elsewhere.

#### DRAFT CLAUSES.

##### CLAUSE 1.

This does not appear to require any comment save that it seems clear that it is necessary to provide that the Act is to bind the State.

##### CLAUSE 2.

The only definitions which appear to require comment are those in paragraphs (iv) and (v). The

desirability of a definition of the word "operation" arises from the provisions of clause 13 (1) (b) which refer to the operation of the vessel. This phrase in turn is taken from the International Convention Relating to Liens and Mortgages of 1967 which themselves appear to have given rise to some dispute as to what operation means. I have, therefore, endeavoured to provide a definition.

The definition of ship is an extension of the definition in the United Kingdom Administration of Justice Act 1956 and endeavours to deal with various matters as to which there has been a question of their status as a ship.

CLAUSE 3.

The Admiralty Courts are the Courts of the Maritime Provinces of the Republic and in certain respects the Witwatersrand Local Division. The latter Division is included because Johannesburg at present is, in effect, an inland port. Further, much of the marine insurance and shipbroking business of the Republic is transacted in Johannesburg.

CLAUSE 4.

Maritime claim is defined in the International

Convention for the Unification of Rules Relating to the Arrest of Seagoing Ships 1952. The United Kingdom Administration of Justice Act 1956 adopts and expands on that definition. I have taken the United Kingdom definition, have endeavoured in some respects, I trust, to clarify it, have dealt (for instance in paragraph (g) ) with matters which have been litigated and have also in some respects gone a little further than the English Act. I have, for instance, adopted a general statement that the Admiralty Court is to have jurisdiction in respect of all maritime claims. This is in accordance with the American and the Scottish rules. It accounts also for the inclusion of marine insurance in paragraph (r). Paragraphs (t), (u) and (v) seem necessarily to arise out of the other provisions. Paragraph (w) is clearly a maritime claim and paragraph (x) is made necessary by the repeal of the Colonial Courts of Admiralty Act which would then leave no provision as to prize courts. Paragraphs (y) and (z) seem to me to be desirable general clauses.

I have endeavoured in clause (2) to identify the proper subject matters for the Witwatersrand Local Division. Clause(4)(a) is an adoption of what I believe to be a desirable objection to the exercise of jurisdiction by an Admiralty Court, namely the objection

of forum non conveniens. (I have the authority of Lord Dunedin in the case of Societe du Gaz de Paris 1926 Scots L.T. 33 for the proposition that "conveniens" is properly translated as "appropriate".) I have expressly provided for a stay on the grounds of a submission to a foreign arbitration because it is far from clear whether the Arbitration Act covers a submission to foreign arbitration.

CLAUSE 5.

It has seemed to me to be proper to preserve generally the rules with regard to actions in personam subject to the abolition of the rule that the person making an attachment must be an incola.

CLAUSE 6.

These provisions are designed to make an action in rem possible. In clause (2) I have set out in extenso what may be attached. This is a statement of the law as it has been developed and it seems to me to be desirable that it should be expressly stated.

Clauses (3) and (4) deal not only with the sister ship arrests which are referred to in the United Kingdom Administration of Justice Act and the Inter-

national Convention Relating to Arrest but also to what I have referred to as an associated ship. Sister ship arrests make it possible for a vessel in the same ownership to be arrested. Since these provisions came into force there has been a tendency towards the formation of so-called "one ship companies", that is to say a company owning one ship only. It has been suggested to me by the Secretary of the Maritime Law Association that it would be desirable to endeavour to deal with this situation. I have done so in clause (4). I appreciate that some of the phrases may seem somewhat indefinite. Clause (4) (b) (iii) has its origin in the definition of controlling company in the Companies Act. Beneficial ownership of shares is, I think, a concept which is recognised in South African Law and is the phrase used in the United Kingdom Act.

Clause (6) is designed to protect the situation which may arise if security is given before arrest. In that case it seems clear that the security ought to be subject to the same rules.

CLAUSE 7.

Much time is wasted in obtaining proper inspection and information at an early stage of proceedings.

Clause 7 is, therefore, designed to deal with this situation.

CLAUSE 8.

As I have mentioned, I think that clause 8 (1) (a) states what the maritime law is. Clause (2) no doubt in its early part states what all courts are designed to do. I have, however, thought it desirable to give express power to enable the judge to expedite matters by giving directions. Clause (3) relaxes the law of evidence. Clauses (4) and (5) provide for third party proceedings and the granting of orders as to which there has been some dispute in the Admiralty Jurisdictions of the United States and the United Kingdom.

CLAUSE 9.

It seems to me to be essential to provide a final and definite method of deciding whether a case is an admiralty case. It would be ridiculous for the case to go its full length and for an appeal to be upheld on the basis that it had been tried in the wrong court. Clause 9 is designed to provide for this situation.

CLAUSE 10.

This clause is designed to deal with the



conflict of preferences which may arise if there has been an attachment of a ship or its cargo at common law and there is a maritime claim in respect of them. The object which appears proper is to give preference to the recognition of the maritime claims.

CLAUSE 11.

This is designed to prevent vessels or cargoes lying about while there is a dispute about them.

CLAUSE 12.

In view of the difficulty of providing for maritime liens to be preferent claims in insolvency (a difficulty which in fact already exists with regard to registered mortgages of ships) it appears desirable to keep the proceeds out of the administration of the trustee or liquidator or judicial manager until claims have been satisfied.

CLAUSE 13.

The ranking of claims is generally speaking in accordance-with the 1967 Convention. There is of necessity a competition between mortgages and other claims. The solution which has been found and which

has been adopted is to make other claims preferent only if they were incurred within a period of one year. Clause (2) is designed to deal with the infinite variety of circumstances which may arise and therefore to give the court power which it seems both the English and United States Admiralty Courts have to vary the order of preference if it seems just. Clauses (3) and (4) are descriptive of the effect of a maritime lien. The second clause (4) (erroneously so numbered) gives effect to a general right of subrogation and clause (5) (which should be (6) ) relates to subsidiary claims:

CLAUSE 14.

This makes provision for the making of rules of court and for the giving of directions by the Judge President of any Division. Clause (4) makes provision for compulsory reference to arbitration or to a referee.

CLAUSE 15.

In view of the difficulties which have arisen with regard to arrests to found jurisdiction provision is made that the Admiralty Court process shall run throughout the Republic and may be served anywhere in the Republic.

CLAUSE 16.

These relate to the provisions which must be repealed and the position with regard to pending proceedings.

CLAUSE 17.

These provisions appear to be the appropriate provisions with regard to adaptation of the Merchant Shipping Act.

D.J.S.

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A PROPOSAL FOR  
AN  
ADMIRALTY COURTS JURISDICTION  
ACT

\*\*\*\*\*

DRAFT PROPOSED BILL

ACT TO CONSTITUTE AND DECLARE THE JURISDICTION OF  
THE ADMIRALTY COURTS OF THE REPUBLIC OF SOUTH AFRICA.

Short Title and  
Application.

1. (1) This Act shall be called the  
Admiralty Courts Jurisdiction  
Act 1981.

(2) This Act shall bind the State.

Definitions.

2. In this Act, unless a different meaning  
appears from the context:

(i) "Admiralty action" means an action  
in rem or an action in personam  
referred to in sections 5 and 6.

(ii) "Admiralty proceedings" means pro-  
ceedings in an Admiralty Court.

(iii) "Maritime lien" means a lien  
referred to in section 13 (3).

(iv) "Operation" in connection with any  
ship includes the navigation or  
management of the ship and the  
loading, carriage or discharge of  
goods, fuel, stores and provisions  
on, in, into or from the ship and  
the embarkation, carriage or dis-  
embarkation of persons on, in, onto  
or from the ship.

"Ship" means any vessel used or  
capable of use in navigation ~~whether~~  
on the sea ~~or other waterways and~~  
includes any hovercraft, powerboat,  
yacht, fishing boat or submarine  
vessel and any barge, crane barge,  
floating crane, floating dock, oil or  
other floating rig, floating mooring  
installation or other similar floating  
object and whether self-propelled or  
not excluding only vessels designed  
for propulsion by oars only ~~and such vessels as~~  
~~are used when in use on non-navigable~~

Admiralty Courts.

3. (1) ~~An Admiralty Court is hereby consti-~~  
~~tuted in respect of each of the~~  
following divisions of the Supreme  
Court of South Africa ~~is hereby constituted~~  
an Admiralty Court.

(a) The Cape of Good Hope Provincial  
Division.

(b) The Eastern Cape Division.

/ (c) .....

- (c) The South Eastern Cape Local Division.
- (d) The Natal Provincial Division.
- (e) The Durban and Coast Local Division.
- (f) The Witwatersrand Local Division.

*(Handwritten signature/initials)*

- (2) For the purposes of this Act the area of jurisdiction of each of the said divisions shall be deemed to include ~~all navigable rivers and~~ the sea within the territorial waters of the Republic of South Africa as defined in the Territorial Waters Act, No. 87 of 1963, adjacent to the said division ~~and all navigable rivers within the jurisdiction of the said division~~

Jurisdiction in respect of claims.

*but subject to sub-section (2)*

4. (1) Each Admiralty Court other than the Witwatersrand Local Division shall have jurisdiction in respect of all maritime claims which without limiting the generality of the foregoing shall include the following:

- ✓ (a) Any claim relating to the ~~title~~ ownership or possession of a ship.
- (b) Any claim to the ownership of any share in a ship and any dispute between co-owners of any ship as to the ownership, possession, employment or earnings of that ship.
- (c) Any claim in respect of a mortgage, hypothecation, charge, right of retention or pledge of any ship.
- (d) Any claim for damage caused by a ship whether by collision or otherwise.
- (e) Any claim for damage done to a ship.
- (f) Any claim for loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the operation of any ship.

/ (g) .....

- (g) Any claim for loss of or damage to goods (including baggage and the personal belongings of the master or crew of any ship) carried or which ought to have been carried in a ship including a claim under section 311 of the Merchant Shipping Act, No. 57 of 1951.
- (h) Any claim arising out of any agreement for or relating to the carriage of goods in a ship.
- (i) Any claim relating to any charter-party or to the use or hire of a ship.
- (j) Any claim for or in the nature of salvage including any claim relating to the sharing or apportionment of salvage and any claim by any person having any right with regard to any property salvaged or which would, but for the negligence or default of any salvor or would-be salvor, have been salvaged against any salvor or would-be salvor for loss caused by the negligence or default of the salvor or would-be salvor in the salvage operation.
- (k) Any claim in the nature of towage or pilotage.
- (l) Any claim in respect of goods or materials supplied or services rendered to a ship for her operation or maintenance.
- ✓ (m) Any claim in respect of the <sup>design</sup> construction, repair or equipment of any ship or any dock charges or dues or harbour charges or dues or any similar charges or dues.
- (n) Any claim by a master or member of the crew for wages and any other payment due to him by reason of his being the master or member of the crew.
- (o) Any claim by a master, shipper, charterer or agent in respect of payments or disbursements made

for or on behalf of a ship or on account of a ship or her owner.

- (p) Any claim relating to general average or arising out of any act claimed to be a general average act.
- (q) Any claim arising out of bottomry or any respondentia bond.
- (r) Any claim relating to marine insurance or any policy of marine insurance.
- (s) Any claim with regard to the forfeiture of any ship or any goods carried therein or for the restoration of any ship or goods from any forfeiture.
- (t) Proceedings for the limitation of the liability of the owner of the ship ~~in terms of section 261 of the Merchant Shipping Act, No. 57 of 1951~~ or of any other person entitled to any ~~similar~~ Similar limitation of liability.
- (u) Proceedings with regard to any claim to or the distribution of any fund or any portion of any fund paid into or held by the Admiralty Court or any of its officers or in terms of the rules relating to proceedings in the Admiralty Court.
- (v) Any claim relating to any maritime lien whether or not the same falls within any of the preceding paragraphs.
- (w) Any claim for pollution of the sea or the seashore by oil or any other similar substance whether under the Prevention and Combating of Pollution of the Sea by Oil Act 1971 or otherwise, and any claim for a refund under the said Act.

P. I. clubs: by regis-  
tered fund.

refund of claims



? Enforcement of  
arbitral awards:  
Act re enforcement.

✓ all prize matters whether  
maritime or not.

(2) A claim <sup>relating to</sup> ~~in respect of~~ or arising  
~~from the use of~~ any ship while the same  
is ~~in use on or is being prepared or is~~  
on land <sup>before or after</sup> ~~after~~ on any stream, non-navigable  
river, dam, lake or the like shall not  
be a maritime claim.

Enforcement

(20) Any claim for the enforcement of or arising out of  
any arbitration award in the Republic Page 5.  
~~or any other matter relating to a maritime claim and  
whenever in the Republic or elsewhere.~~

~~Admiralty Act (No. 101 of 1969)~~

(1) Any claim relating to prize or  
the jurisdiction of the Supreme  
Court as to prize matters.

(2) Any matter ancillary to or  
arising out of any of the afore-  
said claims, including such  
matters as any attachment to  
found jurisdiction, the giving  
or release of security, the  
payment of interest or any other  
matter.

(3) Any other matter which in terms  
of any law is within the juris-  
diction of the Admiralty Court.

The Witwatersrand Local Division shall  
have jurisdiction ~~by way of action in~~  
~~personam only~~

(a) In respect of all maritime claims  
in respect of any ship, cargo or  
fund within or freight payable  
within the area of jurisdiction  
of the said division.

(b) By way of action in personam only  
in respect of any claim under sub-  
section (1) (a), (b), (h), (i) or  
(r).

Save as provided in subsection (2) the  
Admiralty Court shall have jurisdiction  
in respect of maritime claims wherever  
arising (including in the case of sal-  
vage claims in respect of ships, cargo  
or goods found on land) and in relation  
to all ships wherever registered and  
whatever the residence, domicile or  
nationality of the owner.

(a) An Admiralty Court may decline  
to exercise jurisdiction in any  
proceedings whether instituted or  
not if it is of the opinion that  
it is more appropriate that the  
action be brought before another Admiralty  
Court ~~either~~ in the Republic or ~~any other~~  
elsewhere.

(b) An Admiralty Court may stay any  
proceedings if it has been agreed

/that.....

that the dispute the subject of the proceedings be submitted to arbitration either in the Republic or elsewhere or for any other sufficient reason.

Actions in personam.

5. (1) Any maritime claim may be enforced by an action in personam.
- (2) An Admiralty Court shall have jurisdiction in respect of actions in personam against:
- (a) Any person resident or carrying on business at any place in the Republic of South Africa.
  - (b) Any other person whose property within the court's area of jurisdiction has been attached to found jurisdiction in the action.
  - (c) Any person who has consented or submitted to the jurisdiction of the court in the action.
- (3) (a) The law with regard to attachment to found jurisdiction of a division of the Supreme Court shall apply to any such attachment save that it shall not be necessary that the person attaching any such property shall be an incola either of the area of jurisdiction of the court or of the Republic of South Africa.
- (b) The Admiralty Court may order that any person shall give security for costs or for any claim.

Actions in rem.

6. (1) A maritime claim may be enforced by an action in rem brought either solely as an action in rem or together with any action in personam.
- (2) (a) An action in rem shall be instituted by the arrest of one or more of the following against or in respect of which the claim lies:
- (i) The ship either including or excluding her equipment, furni-

/furniture....

(b) The matters referred to in paragraph (a)(i)-(iv) are referred to in this Act in connection with arrest or attachment to "property".

ture, stores and bunkers.

(i) The whole or any part of the equipment, furniture, stores or bunkers or one or more of them.

(ii) The whole or any part of the cargo.

(iii) Freight.

(3) An action in rem may be brought by the arrest of an associated ship.

(4) (a) For the purposes of subsection (3) an associated ship shall mean a ship other than the particular ship in respect of which the maritime claim arose being:

(i) A ship owned by the person who was the owner of the particular ship at the time when the maritime claim arose.

(ii) A ship owned by a company the shares in which were owned by or controlled by a person who, when the maritime claim arose, owned the shares in or controlled the company which owned the particular ship.

make clear that

(b) For the purpose of paragraph (a):

make clear.

(i) Ships shall be deemed to be owned by the same persons if all the shares in the ships are owned by the same persons.

(ii) A person having beneficial ownership of a ship or a share in a ship or a share in a company shall be deemed to be the owner of the ship or the share notwithstanding that he is not registered as the owner.

(iii) A person shall be deemed to control a company if he has power, directly or indirectly, to control the company.

Reservations by Mr. Reinkens  
of Mr. Oron from previous  
provisional views: Santhana  
Depts 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

(6) that any arrest be made subject to such conditions as to it may seem just, and in particular subject to the furnishing of security for any expense likely to be caused by the said arrest.

- (7) ~~that~~ An Admiralty Court may at any time order<sup>ed</sup> that any bail given be increased or reduced ~~and that any person applying for the arrest of any~~
- (8) ~~that~~ An Admiralty Court may order that any person making any excessive claim or requiring excessive bail or security or causing any property to be arrested, <sup>or</sup> damages without <sup>good</sup> cause shall be liable in ~~damages~~ to any person suffering ~~any~~ loss or damage ~~caused~~ thereby.

(c) "Owner" shall not include a charterer whether by demise or otherwise.

? Exclusive bail.  
bail to return  
vessel.

- (5) <sup>Property</sup> ~~A ship~~ shall not be arrested nor shall any bail or other security be given more than once in respect of the same maritime claim by the same claimant.
- (6) (a) <sup>Property</sup> ~~Any ship, cargo or freight~~ shall be deemed to have been arrested and to be under arrest if at any time whether before or after arrest bail or security has been given to prevent the arrest of the ~~ship~~ <sup>property</sup> ~~or to obtain the release thereof from arrest.~~
- (b) The said bail or security shall, for the purposes of sections 10 and 11, be deemed to be the freight or the proceeds of the sale of the ~~ship or cargo~~ <sup>property</sup>.

#### Examinations.

7. (1) The Admiralty Court may at any time on the application of any person interested or of its own motion grant an order for the examination, testing or investigation by any person of any ship, cargo, documents or any property or thing of any nature whatsoever if it appears to the court that any such inspection or investigation is necessary or desirable for the purpose of establishing or investigating any maritime claim which may be or may have been brought or any defence thereto.
- (2) In making any such order the court may order that any record, notes or recording, whether then in existence or not, be transcribed or translated and shall make such order as to the conditions subject to which any such examination, test or investigation shall be made and as to the liability and the furnishing of security for the costs and expenses of any detention, removal or storage and of any such examination, test or investigation or any other step taken under this section as to the court seems just.

Law and Practice.

*The law in force is the  
Court of Admiralty in  
the Republic or the  
arrangement of this  
Act, and*

8. (1)

*arriving at its decision*  
(a) The Admiralty Court shall take cognizance of ~~and apply~~ the maritime law ~~representing the law and customs of the sea generally~~ prevailing among maritime states and may, in considering any maritime claim, take account of the laws and decisions of any such states and of any international convention whether or not the Republic of South Africa is a party to the same.

(b) The provisions of paragraph (a) shall not lessen the effect of any valid provision in any agreement relating to the choice of the system of law which is to apply.

(2) The object of the Admiralty Court shall be to dispose expeditiously and in accordance with law of matters coming before it and to that end a judge of the Admiralty Court may give such directions for the disposing of any matter as to him may seem just notwithstanding that any such directions relate to matters not provided for by this Act or the rules or are contrary to any provisions of the rules.

(3) Notwithstanding any other provision of any other law evidence of statements which would otherwise be inadmissible as being hearsay and evidence in writing or on affidavit shall, subject to any directions given in terms of this Act or the rules, be admissible in the Admiralty Court but the weight to be attached to any such evidence shall be a matter for the decision of the judge.

(4) The Admiralty Court may permit the joinder in any admiralty proceedings of any person from whom any party to any admiralty proceedings is entitled to claim a contribution or indemnification or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and should properly be determined in such a manner as to bind the person to be joined whether or not the claim

/against.....

against the person to be joined is a maritime claim and notwithstanding that such person is not otherwise amenable to the jurisdiction of the Admiralty Court whether by reason of the absence of any attachment of his property or otherwise.

- (5) The Admiralty Court may grant any relief or order which can be granted by any division of the Supreme Court of South Africa and in particular may grant an order for rectification of any contract for specific performance or for a declaration of rights notwithstanding that no other relief is or could be claimed and may make such order as to interest and the rate of interest on any sum awarded by it and as to the date from which such interest is to run whether it be before or after the date of the commencement of the action or the making of the order as to it seems just.

Disputes as to  
jurisdiction.

9. (1) If any question arises before any court as to whether a matter proceeding or pending before it is one relating to a maritime claim the court shall forthwith decide that question.
- (2) If the court decides that the matter is a maritime claim:
- (a) If the matter is proceeding or pending before a court other than the Admiralty Court the court shall order that the matter be transferred to the Admiralty Court where it shall proceed as a maritime claim instituted by an action in personam and any property attached to found jurisdiction shall be deemed to have been attached under section 5 (2) (b).
- (b) If the matter is one proceeding or pending before the Admiralty Court it shall continue before the Admiralty Court.
- (3) If the court decides that the matter is not a maritime claim:
- (a) If the matter is one pending or proceeding before the Admiralty Court the court shall order that it be transferred for hearing to the division of the Supreme Court

/which....



which would otherwise have jurisdiction in respect of the action: provided that if the action is one in personam in which jurisdiction is conferred by section 5 (3) by an attachment by a person other than an incola the court may order the action to proceed as if the property had been attached by an incola or may make such other order including an order dismissing the action for want of jurisdiction as to it appears just.

- (b) If the action is pending or proceeding before a court other than the Admiralty Court the action shall continue before the said court but without affecting any other objection to the jurisdiction of the said court.
- (4) (a) No appeal shall lie against any order made under this section.
- (b) Any claim heard and decided as a maritime claim shall be deemed for all purposes to be a maritime claim.
- (c) No appeal against any order or the consequences of any order shall lie on the ground that the claim was not a maritime claim.
- (5) No appeal shall lie against any order of the Admiralty Court save a final judgment or order of the court with regard to which an appeal may be made to the Appellate Division as if the judgment or order were one given or made by the court of a provincial or local division of the Supreme Court in civil proceedings.

Arrests and Attachments.

- 10. (1) Where any ~~ship, cargo or freight~~ <sup>property referred to in 4 b</sup> has been attached to found jurisdiction at common law it may nevertheless be attached or arrested in connection with a maritime claim.
- (2) Where any ~~ship~~ <sup>such property</sup> has been attached sections 11, 12 and 13 of this Act shall apply as if the ship had been arrested in an action in rem whether or not the ship has been attached or arrested in

an admiralty action.

Sale of property  
attached or arrested.

11. Any property which has been attached or arrested in an admiralty action may at any time be ordered by the Admiralty Court to be sold and the proceeds thereof held as a fund in the Admiralty Court.

Application of bail  
or security.

12. Any ~~ship~~ <sup>property</sup> attached or arrested or any bail or security given in respect of any ~~ship~~ <sup>property</sup> or the proceeds of any ~~ship~~ <sup>property</sup> sold in execution or in terms of any order of the Admiralty Court shall not vest in any trustee in insolvency nor form part of the assets to be administered by any liquidator or judicial manager of the owner of the ship or of any other person who might otherwise be entitled to such ~~ship~~ <sup>property</sup>, bail, security or proceeds.

Ranking of claims.

13. (1) The claims with regard to any fund in the Admiralty Court or any bail or security given in respect of any ~~ship~~, ~~cargo, freight or other~~ property in connection with any maritime claim or the proceeds of any property sold pursuant to any order or in execution of any judgment of the Admiralty Court shall be paid in the following order:

- (a) Costs and expenses incurred in order to preserve the vessel or to procure its sale and the distribution of the proceeds of the sale.

- (b) (i) The following claims if they arose within a year before the arrest or attachment, ~~the claims in sub-paragraph (i) to (iv) to rank pari passu as between themselves and those in sub-paragraph (v) in the inverse order of the time when the claims accrued.~~

- (ii) Wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement in respect of their

/employment.....

- (aa) (ii) The claims in paragraph (i) shall rank ~~as follows~~ <sup>in the</sup> ~~in the~~ order listed, save that ~~the~~ <sup>a claim</sup> ~~claims~~ referred to in paragraph (ee) shall take priority over all other claims which arose before any such claim referred to in paragraph (ee) accrued.
- (bb) The claims referred to in paragraph (i) (aa) - (ee) shall rank pari passu with other claims in the same paragraph.

<sup>2</sup> necessary  
man.

employment on the ship.

(bb)  
~~(bb)~~

Port, canal and other waterway dues and pilotage dues.

(cc)  
~~(cc)~~

Claims against the owner in respect of loss of life or personal injury occurring whether on land or on water in direct connection with the operation of the vessel.

(dd)  
~~(dd)~~

Claims against the owner based on delict and not capable of being based on contract in respect of loss of or damage to property occurring whether on land or on water in direct connection with the operation of the vessel.

(ee)  
~~(ee)~~

Claims for salvage, wreck removal and contribution in general average which shall be deemed to have accrued:

(aa) As to claims for salvage and wreck removal when the salvage operation or wreck removal terminated.

(bb) As to contributions in general average when the general average act was performed.

(c) Mortgages, hypothecations, rights of retention and other charges upon the vessel duly effected in accordance with the law of the flag of the vessel and registered in a public register either at the port of the vessel's registry or at a central office.

(d) Any other maritime lien *including a claim by a repairer or necessary man.*

(e) All other claims in the order of preference provided by the law relating to insolvency.

(2) The court shall have power on application by any interested person to determine how any claims against any proceeds shall rank and to make such order as to the court may appear just and in making any such order:

- (a) The court shall take into account:
  - (i) Whether any claim is a maritime claim or any other claim.
  - (ii) When liability for any claim was incurred in relation to the incurring of liability for any other claim.
  - (iii) During what voyage or during what period or season the liability for the claim was incurred.
  - (iv) Any matter which to the court appears relevant for the purpose of arriving at a just and appropriate distribution of the proceeds.
- (b) The court may in any manner for the purpose of arriving at a just and appropriate distribution of the proceeds vary the order of priorities set forth in subsection (1).

(3) A maritime lien shall arise:

- (a) From any claim referred to in subsection (1) (a), (b) or (c).
- (b) In any other manner recognised *by the court*  
*during war* ~~by the law and customs of the sea referred to in section 8~~  
(1) (a).

(4) A maritime lien shall:

- (a) Confer on the holder a preferent right over the property concerned.
- (b) Entitle the holder to the rights conferred by the lien against any owner of the property whether or not the lien arose before the owner against whom the rights are sought to be enforced became owner and whether or not he became owner without notice of the lien.
- (c) Be terminated only by a sale of the property in respect of which the lien is held in terms of an order

(7) A judgment or arbitration award on any claim shall be deemed to be and shall rank as if it were the claim on which it was given.

Fees & costs: determined by  
other person.

Bringing of rep. returns  
nominal fees etc.

of an Admiralty Court or any other court having jurisdiction in respect of the relevant maritime claim or by the discharge of the claim in respect of which it arose.

5  
(4) Any person who has at any time paid any claim or any part thereof which if not paid would rank under subsection (1) shall be entitled to all rights, priorities, privileges, preferences and liens to which the person paid would have been entitled if the claim had not been paid.

6  
(5) Interest on any claim and the costs of enforcing the claim shall be deemed for the purposes of this section to be part of the claim.

Rules of Court. 14. (1) The Judges President of the Cape Provincial Division, the Eastern Cape Division and the Natal Provincial Division shall have power to prescribe by rule all matters relating to the practice and procedure of the Admiralty Court including:

(a) Forms of process, writs and other documents either to be observed or to serve as a guide.

(b) The appointment and functions of officers.

(c) Fees and costs, including the power to

provide for the assessment of fees by any person or body provided in the rules.

(d) Any matter which they are of the opinion is necessary or desirable with regard to the carrying out of the functions of the court, including the power to provide for representative actions or ~~representative~~ ~~plaintiffs~~

any step or procedure necessary to avoid circuity or multiplicity of actions

(2) The Judge President of any division within the area of jurisdiction of which any admiralty court or courts fall may prescribe by rules relating to that court or those courts only any matter not provided for by the general rules referred to in subsection (1).

(3) The Registrar of each Admiralty Court shall cause a copy of any rules made under subsection (1) or under subsection (2) relating to the division of

Prize Institution .

(b) Proceedings shall be deemed to have been instituted if the writ of summons has been issued.



which he is registrar to be kept available for inspection by any member of the public at any time during office hours.

- (4) Any such rules may make provision for the reference of one or more matters arising in connection with any admiralty proceedings to arbitration or for report by any referee and for the appointment, remuneration and powers of any such arbitrator or referee (which powers may, in addition to or in substitution for any powers provided in any such rules, be such powers as may be conferred on the arbitrator or referee by any order of court) and for the effect of any award of any arbitrator or any report of any referee.

Scope and Execution of Process of Admiralty Court.

- (1) The process of each Admiralty Court shall run throughout the Republic.  
(2) The said process may be served or executed:

*by the marshal*

- (a) By ~~any officer~~ <sup>the marshal</sup> of any Admiralty Court ~~or his Deputy~~ <sup>his Deputy</sup>  
(b) By the Sheriff or ~~Deputy Sheriff~~ <sup>his Deputy</sup> in any place situate outside the area of jurisdiction of an Admiralty Court.

Repeals.

16. (1) The Colonial Courts of Admiralty Act 1890 (53 and 54 Vict. Cap. 27) of the United Kingdom and the Admiralty Jurisdiction Regulation Act, No. 5 of 1972, are hereby repealed.

*Proceedings started.  
Jasim J. J. J.*

- (2) ~~Any proceedings instituted in the Court of Admiralty in terms of the Colonial Courts of Admiralty Act and not completed at the date of the commencement of this Act shall be deemed to be proceedings of the like nature under this Act and shall continue accordingly.~~ *as if the under the same Act as if the Act had not been repealed*

Amendments to and application of Act No. 57 of 1951.

- (1) The Merchant Shipping Act, No. 57 of 1951, is hereby amended:

- (a) By the substitution for the definition of "Superior Court" in section 2 of the following definition:

43(b)  
292  
339  
"Superior Court means a division of the Supreme Court of South Africa save that in sections 45, 89 and 330 it shall mean an Admiralty Court established by the Admiralty Courts Jurisdiction Act, No. of 1981."

- (b) By the repeal of sections 51A, 329 and 332.

- (2) An Admiralty Court as aforesaid shall be a court of competent jurisdiction under section 336 (5) and a court having jurisdiction under section 336 (7) of the Merchant Shipping Act, No. 57 of 1951.